

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Stephanie P. McDonald, Circuit Court Judge

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively on Behalf of
The I'On Assembly, Inc.; and I'On Assembly, Inc.,

Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a
Civitas, LLC, and I'On Realty, LLC,

Petitioners.

**RECORD ON APPEAL
VOL. III
R. pp. 1001 - 1500**

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J. HUSSEY -- DIRECT BY MR. EVANS

1 A. Now there is a dock that is -- it's -- it
2 extends out, basically like that, and then has a ramp
3 and then goes down to a floating dock where you can
4 moor your boat. There is also the boat ramp. And then
5 next to the boat ramp is another dock where you can
6 moor your boat on one side. The other side, you would
7 use to get -- to stop your boat so you can get on to
8 the land -- the boat ramp.

9 Q. Are those -- the old rickety dock and the dock
10 that has the pavilion on it today, the same location?

11 A. Pretty much so, yes.

12 Q. Why were you showing folks the old rickety
13 dock and the old boat ramp when you were walking them
14 around on Saturdays?

15 A. Well, one, it was beautiful to see. And the
16 other is this -- this type of development is a little
17 bit different than some other -- I have said that
18 before. But the -- a regular, standard subdivision, a
19 lot of what it's selling is privacy -- Vince would
20 always say this -- it's selling privacy. So -- and
21 it -- kind of exclusion -- oh, you're in this
22 neighborhood. But the more you sell, the less privacy
23 and exclusion there is.

24 In this neighborhood, you are selling community.
25 So the more community you create, the better it is. So

J. HUSSEY -- DIRECT BY MR. EVANS

1 it's not -- the idea isn't to kind of get in and get
2 out, the idea is in selling your most expensive lots
3 first, the idea is to start small -- in our case, we
4 started -- this case we started in the front on
5 property that was on the corner of a big lake, and --
6 kind of near Mathis Ferry Road -- and then you work
7 your way to the back, so you increased your value back
8 there. But you are also asking a premium for the lots
9 in the front because people want to buy the deep water
10 lots, they want -- I mean they want to be by the water.
11 We are in the lowcountry.

12 But -- so one of the things that you remind them
13 is that this is your amenity, and what's the best is
14 you can live up here in the front, and you can use the
15 amenities and have the amenity of the parks; you don't
16 have to live next to a park, you can just go down to
17 the park. You can -- you can -- you don't have to live
18 next to the lake, because there's a path that walks
19 around the lake, and a park on the lake, and you can go
20 sit on -- in a park as if you were sitting on your own
21 porch. And so this -- we wanted to make -- remind
22 people, these are the amenities you're going to get
23 when you buy your lot in front.

24 Q. Was that the message in the print marketing?

25 A. It was. I mean we -- like, for example, we

J. HUSSEY -- DIRECT BY MR. EVANS

1 had the Coastal Living Home, and that was not on the
2 marsh, but the whole ad talked the marsh and the value
3 of the marsh because we wanted people to see that we
4 were a lowcountry development, and we understood the
5 marshes.

6 Q. And the water, was that the message for
7 Saturdays In I'On?

8 A. That was one -- some of the messages for
9 Saturdays In I'On.

10 Q. Specifically, what were people told about the
11 dock, land, and the waterfront?

12 MR. DUFFY: Objection to the form, Your Honor. I
13 mean if she told them or if she was there or something
14 else, but what people were told is a little bit vague.

15 BY MR. EVANS:

16 Q. The message that was conveyed by the developer
17 regarding the dock plan and the waterfront, that you --
18 that you heard, that you were a part of?

19 A. This is -- this is -- this is a part of the
20 vision of the community for you.

21 Q. Ms. Hussey --

22 A. Yes.

23 Q. On the screen, you see Plaintiff's Exhibit
24 145; what is this?

25 A. This is -- I have the original of that, too.

J. HUSSEY -- DIRECT BY MR. EVANS

1 This was a map -- I'll kind of roll it out -- it's a
2 deed to the property --

3 Q. I think we all probably had a little
4 difficulty hearing you under the unrolling.

5 A. I'm sorry. We made it like it -- it was
6 almost like a deed, like your -- it's your property,
7 you know. This was the property you were getting from
8 the king. It is your -- your map of the property, the
9 grand plan.

10 Q. And in the upper right hand corner, what's the
11 title?

12 A. The Grand Plan of I'On.

13 Q. And what's the date?

14 A. 1997.

15 Q. Who produced this material?

16 A. I helped -- Milton Grimfall drew it and it was
17 Vince's idea, and I helped just get it to print.

18 Q. And you mentioned who was involved in it, but
19 it was produced by the developer, the I'On Company?

20 A. Yes. It was produced by the developers.

21 Q. If you can blow up the upper -- can you point
22 out for us where the community dock at Creekside Park
23 is located?

24 A. The community dock is here. It looks a little
25 different. This looks more like the dock down at New

J. HUSSEY -- DIRECT BY MR. EVANS

1 Point, but it's here. This is the park -- these are
2 marsh walks. Here is another small, crabbing dock,
3 boat ramp is right around here.

4 Q. How do you know that's the Creekside Park and
5 the community dock?

6 A. Well, this is the creek.

7 Q. Well, what is the significance of that being a
8 creek on the top as opposed to what's on the left?

9 A. Well, this is the deep water, so if you know
10 anything about water -- this is real deep water. This
11 is deep water high tide and this is deep water at low
12 tide. This is very tidal. And at low tide, it's hard
13 to get your boat -- you could maybe get kayaks, things
14 like that, but it's hard to get real big boats. It's
15 not a real -- it's more tidal. This isn't really the
16 creek, this is a tributary that comes off of the creek.

17 Q. Let's actually move ahead in time. You've
18 been telling us about your early involvement in I'On,
19 correct?

20 A. Yes.

21 Q. Where do you live?

22 A. I moved into I'On in 2010.

23 Q. Where were you before?

24 A. Living downtown.

25 Q. What attracted you to move into I'On in 2010?

J. HUSSEY -- DIRECT BY MR. EVANS

1 A. Well, I love living downtown, but we -- my
2 husband, we have two buys, as I said, and they were
3 four and six. My husband had built a boat and would
4 boat -- and he was pretty proud of it -- and he had to
5 keep it in a shop because we didn't have a driveway, so
6 we needed a place so we could keep it, and so we needed
7 to move.

8 And so we started looking and I'On had -- it had
9 the place where we could park our boat behind our
10 house. It had -- the neighborhoods and restaurants
11 like I like from downtown. It just had the things that
12 we both wanted. He -- there was some other
13 neighborhoods he liked a little more, but I liked I'On
14 so...

15 Q. Am I correct that you moved into I'On -- you
16 bought in March of 2010 and moved in, in April?

17 A. Yes, of 2010.

18 Q. And prior to moving into I'On -- prior to
19 actually purchasing your property in I'On --

20 A. Yes.

21 Q. -- did you contact your friends, the
22 developers?

23 A. I did. I did. We -- we had the contract, but
24 before we closed, I thought, you know, I -- before -- I
25 called Vince and kind of make sure. There is

J. HUSSEY -- DIRECT BY MR. EVANS

1 something -- anything I need to know. And so I called.
2 And I can't remember if we met in person, or we just
3 did it on the phone. Because we, over the years, have
4 met both ways. And I said, "Vince, I'm so excited. I
5 think I'm moving to I'On. We put a contract on this
6 house, 329 North Shelmore. And Bill built this boat,
7 I'm so excited" -- I'm sure I said the boat part
8 because I was bragging about my husband -- and "is
9 there anything I need to know".

10 And he said, yes, I remember him saying, there
11 is some traffic in the area, some people have
12 complained of the traffic where you are. And I said,
13 well, we were used to traffic from downtown, so things
14 were good.

15 Q. Did Mr. Graham disclose to you that he had
16 sold the boat ramp and community dock --

17 A. No, he did not.

18 Q. -- at Creekside Park?

19 A. No, he did not.

20 Q. Had you known that the dock, the park and the
21 ramp had sold, would that have impacted your decision
22 to move into I'On?

23 A. Yes, yes, it would have.

24 Q. Why?

25 A. Well, that was on my husband's list of his top

J. HUSSEY -- DIRECT BY MR. EVANS

1 thing that he wanted. We trailer our boat. We've
2 always trailered our boat, so using the ramp is
3 something we needed to do, and having the ramp there in
4 the community was important, I -- yeah.

5 Q. Knowing now that Creekside Park and community
6 dock are -- had been sold to somebody else, how has
7 that affected your -- how has that affected you?

8 A. Well, I -- it broke my heart. I think that --
9 I love I'On. I mean, I loved working for it, and I
10 loved selling it, and I was really one of its biggest
11 cheerleaders. And I really believed in what -- the
12 type of neighborhood it offers. And I felt like it was
13 the hope for our community -- and I mean our whole
14 region.

15 In fact, I'm not the only one who thinks that
16 because I worked on the regional plan, and I know that
17 pretty much every county in the tricounty area has this
18 type of development and the plan -- in their plans.

19 So, the idea -- these amenities could just be
20 treated as if, oh, well, you know, promises; sometimes
21 you win, sometimes you don't, that was heart breaking.

22 It was also heart breaking because my husband
23 had other neighborhoods that he liked, and I made the
24 sales pitch for this. I didn't ask a lot of questions,
25 I guess, about the dock because I thought I knew. I

J. HUSSEY -- CROSS BY MR. DUFFY

1 mean, I thought I knew the story, and I didn't hear
2 anything contrary.

3 And to have to tell him, I heard that we may not
4 have ownership of the docks was pretty awful, and we
5 use those docks. That dock is a really important part
6 of my family's life. So, yeah, it sucks.

7 MR. EVANS: Thanks, Ms. Hussey.

8 THE COURT: Okay. Cross-examination.

9 **CROSS EXAMINATION BY MR. DUFFY:**

10 Q. Good afternoon, Ms. Hussey.

11 A. Good afternoon.

12 Q. I want to see a couple of things you brought
13 with you, if I can?

14 A. Sure. Sure.

15 Q. Thank you. This Civitas Journal you looked
16 at?

17 A. Uh-huh.

18 Q. In the paragraph that was read, says that
19 "Parks provide access to the neighborhood's lakes and
20 community docks"; is that right?

21 A. "Parks provide access to the neighborhood's
22 lakes and the community docks along Hobcaw Creek."

23 Q. Okay. And when was that written?

24 A. In -- well, the publishing date -- so it was
25 probably written a little bit before this -- but the

J. HUSSEY -- CROSS BY MR. DUFFY

1 publishing date was August, 1997.

2 Q. Okay. You weren't telling everybody the HOA
3 was going to own these things, were you?

4 A. I don't think we were telling them that they
5 weren't.

6 Q. Okay. Providing access; is that right?

7 A. Yes. You know, it's interesting, because I've
8 been looking at this and I think part of it is a
9 problem of the comma, because it says "Parks provide
10 access to the neighborhood's lakes and the community
11 docks along Hobcaw -- comma -- enable the residents to
12 enjoy its beauty". So really the comma should probably
13 go before the "and". I'm kind of embarrassed about
14 that since I was the editor, but it is community docks.

15 Q. Right. And community docks -- plural -- were
16 part of the vision from the start; is that right?

17 A. Yes.

18 Q. And, in fact, the comparison that was made in
19 the advertisements that you worked on in '97 and '98,
20 were there were going to be community docks instead of
21 individual docks, right?

22 A. Correct. That was -- that was the
23 environmental, yes.

24 Q. Right. Right.

25 A. Primarily this one community dock that you

J. HUSSEY -- CROSS BY MR. DUFFY

1 could see that was there. The rest of it was all crazy
2 woods. I mean, you couldn't see anything. This, you
3 could go down and see it, so people knew. When you
4 said, "docks", this is what you meant.

5 Q. There weren't going to be any private
6 individual docks; that was the distinction, right?

7 A. That what -- that was what we -- that's what
8 we told people, yes.

9 Q. Right.

10 A. And that's what -- yeah.

11 Q. And that was referring to homeowners not being
12 able to build private docks out into the marsh?

13 A. That's correct, yes, because that was better
14 for the environment and the Army Corps of Engineers
15 liked that, too.

16 Q. Good. Okay. Ms. Hussey, is this an
17 advertisement -- a draft or one that was used that you
18 worked on?

19 A. Yes. I think I might have it, but yes. Okay.
20 I got it here.

21 Q. Okay. Great. Now, this is advertising that
22 they are going to be community docks, right?

23 A. Yes.

24 Q. They are making the distinction that that's
25 different from the individual docks, right?

J. HUSSEY -- CROSS BY MR. DUFFY

1 A. Yes. They minimize the impact of individual
2 docks and landings that protect our environment.

3 Q. Okay. Could you highlight the small print,
4 that would be captioned, I imagine, just above where it
5 says "community docks".

6 A. The marshes of Hobcaw Creek?

7 Q. Yes. Now, that says, "The marshes of Hobcaw
8 Creek are one of Mount Pleasant's most wonderful assets
9 and wanting to share this beauty with all of the
10 residents and friends in the neighborhood, I'On has
11 miles of linear parks along the waterfront and
12 community docks rather than individual, private ones";
13 isn't that right?

14 A. That is correct.

15 Q. Is the linear park referring to the Marshwalk?

16 A. Yes. The Marshwalk would qualify as a linear
17 park. A linear park is a park that takes -- it's like
18 a path. It's a park that takes you from place A to
19 place B. A passive park is a quiet park; a park that
20 you just sit in. An active park, a playground park is
21 a playground park, so there's differences of different
22 types of parks.

23 Q. Okay. Thank you. And the next page of this
24 exhibit, which I'm sure you have with you, came in your
25 file -- you'll see it in just a minute, Defendant's 98.

1 A. Yeah. I think I have that one, too, uh-huh.

2 Q. Okay. This is describing what, linear parks?

3 A. Yeah, what I just said.

4 Q. This is '97 or '98, it's telling everybody,
5 we're going to have linear parks in I'On, right?

6 A. Yes.

7 Q. Okay. The same caption print please, Lea Ann.
8 Okay. In fact, this says it's a rendering of I'On from
9 marshes of Hobcaw Creek, "Like the old post road along
10 the banks of the Intracoastal Waterway in Rockville,
11 I'On will have a linear park at the edge of its marsh
12 front; do you see that?

13 A. Yes, I do. And we do have that.

14 Q. Right. And it's referring to the path -- and
15 at the end of the path, this is referring to Rockville;
16 is that right?

17 A. Yes.

18 Q. And the Sea Island Yacht Club is at the end of
19 the path in Rockville; is that right?

20 A. Yes, it is.

21 Q. And that's a private club, isn't it?

22 A. I guess. I don't know the ownership of that
23 club.

24 Q. Okay.

25 A. But I do know that the porches of that club

1 were referred to many times. And you can sit up here
2 and rock on your -- your -- this huge porch, and look
3 out over the waterfront, it will be beautiful -- as big
4 as the porches of the Rockville Yacht Club.

5 MR. DUFFY: Thank you.

6 THE COURT: Any redirect?

7 MR. EVANS: Nothing, Your Honor.

8 THE COURT: All right. You may be excused. We'll
9 give you a minute to get your stuff together. All
10 right. Let me regroup with the attorneys and see where
11 we are for the day, and what our plan for tomorrow is.
12 Why don't you all come up and fill me in.

13 (Whereupon, a sidebar was held.)

14 THE COURT: All right. Ladies and gentlemen, we
15 have one more short witness that we are going to put up
16 for you all today by way of a videotaped deposition.
17 It should move along quickly. And then we will let
18 y'all go for the day, while we stay and work on some
19 things. So call your next witness, if you would.

20 MR. LUCEY: Actually, we have a three minute fact
21 witness and a 38 minute video, Your Honor. I thought
22 you wanted us to put them both on, but we will do
23 whatever the court wants.

24 THE COURT: You know, at some point, I have to
25 give my folks up here a break and not just the jury.

1 So put -- can we do the video now -- or is the witness
2 here -- we can get witness in and out so they don't
3 have to come back.

4 MR. LUCEY: They will be back anyway. It's
5 completely the court's convenience.

6 MR. DUFFY: I don't know who it is, so I can't
7 promise we are going to be three minutes.

8 THE COURT: All right. Let's do the video, then
9 we will just have to regroup on our other plan.

10 (Whereupon, the video deposition of Michael
11 White was played for the jury.)

12 THE COURT: Okay. That is the conclusion of the
13 excerpted deposition. Ladies and gentlemen, I am going
14 to let y'all go for the day, please don't discuss
15 anything about the case, as it has not yet been given
16 to you for deliberation. The main question I need some
17 help with the attorneys on is what time should we bring
18 the jury back in the morning. I know we might have one
19 or two more witnesses, are there any legal matters we
20 will need to put on the record in the morning before
21 the jury gets here, or will taking things out of order
22 just make it more confusing.

23 MR. LUCEY: May we approach, Your Honor?

24 THE COURT: Sure.

25 (Whereupon, a side bar was held.)

1 THE COURT: Ladies and gentlemen, the lawyers are
2 going to gather some information for me to work on in
3 the morning before y'all get here, so they're going to
4 come a little earlier, but if y'all would come back at
5 10:00 tomorrow. I want to do the best I can to keep
6 you from having to sit back there. If -- we can be
7 here working at lunch or a different time, that is
8 probably going to be a little unavoidable later
9 tomorrow afternoon, but be here at 10:00, and we'll get
10 started before you get here and hopefully be able to
11 wrap it up and use your time as efficiently as
12 possible. Okay. Good night, have a safe trip home.
13 Thank you. I appreciate you all being willing to do it
14 that way.

15 (WHEREUPON, the jury leaves the courtroom at
16 5:40).

17 THE COURT: Let's mark the video as a court's
18 exhibit. There's some e-mails showing what the spots
19 are.

20 MR. LUCEY: Are we at ease, Your Honor?

21 THE COURT: We are at ease. Anything we need to
22 take up, though, before I let you all go for the day?
23 Y'all have done a lot of work today and I know
24 everybody is tired.

25 MR. LUCEY: Not from the plaintiff, Your Honor.

1 MR. DUFFY: 9:30 tomorrow?

2 THE COURT: I'll see y'all at 9:30, and we'll take
3 it in whichever order you all like and go from there.
4 Okay. Thanks guys. Good job today everybody -- guy
5 and gals.

6 (Whereupon, the trial was recessed for the day.)

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1 * * * P R O C E E D I N G S * * *

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3 THE COURT: Thank you so much. All right. I have
4 been trying to put out some fires. I have not had a
5 chance to review the brief yet, but I will review it as
6 we argue this morning.

7 First of all, just from a chronological
8 standpoint, do we have another witness this morning or
9 is the plaintiff planning to rest; do we know?

10 MR. LUCEY: We have one short witness, Your Honor.

11 THE COURT: One short witness. Okay. Is there
12 any objection or will it in any way prejudice the
13 defendants to go ahead and -- I don't know -- we may as
14 well put the witness on at this point. It's going to
15 take y'all a while to argue, I assume. But I'm happy
16 for you to argue now if that doesn't put anybody in a
17 bad position.

18 MR. DUFFY: I just don't know who the witness is.

19 THE COURT: Well, I imagine -- what, is it Ms.
20 Bedell?

21 MR. LUCEY: Yes, ma'am.

22 THE COURT: That's what I figured. And we heard
23 part of her testimony before. I don't anticipate that
24 there will any surprises in the testimony, but we are
25 moving along better, and I'm pleased with that.

1 If y'all would prefer that I take this time to
2 read this brief, and anything else you want to give me,
3 and then we'll just put Ms. Bedell up at 10:00 and give
4 the jurors a break, I'm fine to do that.

5 MR. LUCEY: Rather than cause a delay, we are
6 going to withdraw Ms. Bedell.

7 THE COURT: Oh, okay. Well, then, we can go ahead
8 and argue now, because I assume the plaintiff will
9 rest?

10 MR. LUCEY: Yes, Your Honor.

11 THE COURT: All right. Like I said, I haven't had
12 a chance to read this, it was in my chair this morning,
13 but I will read it.

14 Let me give y'all a few points of what I'm going
15 to want to hear about on directed verdict. With
16 respect to the seal, I haven't read the brief yet. I
17 have, however, read all the cases -- and they are all
18 over -- the cases in United States District Court, I
19 think Judge Norton was one of the ones that is closet
20 to this, except for it's not a real estate contract,
21 and that's pretty significant.

22 I think Treadaway (ph) is one of the South
23 Carolina cases -- they are all over the place, and as
24 with some of our appellate jurisprudence, I can't tell
25 why they decided something at one time and one time

1 another. Some of it doesn't make any sense; some of it
2 directly contradicts what's previous. But one thing
3 the court seems pretty clear on is that they're looking
4 to the intent of the contract. So a bond situation
5 versus a real estate situation is going to be
6 significant to me.

7 But I'm also probably -- just to give y'all a
8 hint, going to pull the old -- even if the 20 years
9 didn't apply here, is why the three years doesn't, or
10 why it isn't here.

11 I want y'all to address whether there's been any
12 lulling behavior on behalf of the developers, with
13 respect to going back and forth. We are going to sell
14 it; we aren't going to sell it. We are to do it this
15 way; we're not going do it this way. And whether the
16 trigger date we're really looking at is the date of
17 transfer to Russo, and the 148 Civitas folks. Because
18 that's when it became very clear to the landowners in
19 I'On that that parcel, CV-6, couldn't be given to them
20 regardless of any representations that the jury may
21 find have been made, because it was gone then and gone
22 to a third party.

23 And so y'all need -- that's how I would argue
24 it. That's how I'm looking at it. And then, you know,
25 that's just free legal advice and those are the

1 questions that are going to be coming.

2 So -- because, you know, this is the second
3 trial we've sat through. I have not read every single
4 exhibit word for word, but I've looked at lot of them.
5 And I'm not saying anybody was sophisticated enough to
6 try to cause a statute of limitations problem, because
7 I really don't think that's what happened here, but the
8 way the various representations and the promises were
9 made, is going to be really hard for me to consider
10 that in the -- not construe it against the drafter, I
11 guess is the best way to look at it. Okay.

12 That being said, I'm happy to hear from anybody
13 that's got a directed verdict motion they need to make.

14 MR. DUFFY: Thank you, Your Honor. I plan to take
15 some of the claims that Mr. Whitaker takes, and some
16 others --

17 THE COURT: Okay. That's fine.

18 MR. DUFFY: Just to address a couple of things
19 that you raised right off the bat, the lulling behavior
20 that you were referring to, Your Honor, is -- I suppose
21 there would be -- would talk about -- the issues are
22 the discussions with the Assembly about these kind
23 of -- these properties.

24 THE COURT: And the e-mails and just -- the back
25 and forth -- this was a moving target and the story

1 changed often.

2 MR. DUFFY: And one thing that's clear about it
3 is -- at least the representations about giving
4 anything that is going to be given only, ever applied
5 to the docks.

6 THE COURT: Okay.

7 MR. DUFFY: And --

8 THE COURT: The docks are access to the
9 waterfront.

10 MR. DUFFY: The docks.

11 THE COURT: Okay.

12 MR. DUFFY: And the -- and the other indications
13 are, they are going to be sold to them, from 2007 on,
14 and obviously you're not going to give it to anybody if
15 you're going to sell it to them.

16 And, Your Honor, the completion of the docks,
17 all the docks in the Creek Club, were all finished by
18 April of 2001. They've been paid for by -- for use,
19 nonstop ever since by the Assembly. And they are
20 different triggers for statute of limitations based on
21 different claims, individuals and the Assembly. The
22 Assembly clearly knew they didn't own it because they
23 were paying for it forever.

24 The -- let's see -- another issue on the
25 tolling, Your Honor, if -- the way that equitable

1 tolling works, which is per Your Honor's decision, the
2 equitable issue that's important -- the way the cases
3 work is, okay, if let's say there was a pause, how long
4 did you wait until afterwards to do something. And the
5 cases suggests that, okay, well, we'll give you a
6 little break here, because you did it really quickly
7 afterwards. Well, I mean, after the sale in 2009, it
8 was well over a year until a suit was brought, which is
9 not -- which is well beyond the cases that I've seen
10 that suggest the tolling period should apply and allow
11 --

12 THE COURT: What was the date -- I think it was
13 the Chad Besenfelder e-mail, but I might be wrong --
14 Vince would really like to honor the promises to the
15 homeowners. Do we know when the date of that e-mail
16 was?

17 MR. DUFFY: Well, the date of that is sometime the
18 Spring of '09, but that was only made to Mr. Russo and
19 not to any of the homeowners, so they have no basis for
20 relying on that.

21 THE COURT: Okay. That's helpful.

22 MR. DUFFY: So there was an indication in the
23 minutes, that they were preparing to deed over the
24 docks. That is the issue that I was referring to,
25 which is if there is anything in that timeframe that

1 would give them something, it's only about the docks.

2 THE COURT: Okay.

3 MR. DUFFY: And our argument, of course, Your
4 Honor, is that this statute had long since run for a
5 host of reasons. We list them in the brief, which
6 I'll, you know, obviously incorporate into this
7 argument -- I don't want to go through --

8 THE COURT: The brief will be incorporated into
9 argument, and I promise I will break and read it in
10 detail before I rule on anything. I just -- I don't
11 want to read it while y'all argue, because I want to
12 listen to you, what you have to say.

13 MR. DUFFY: Okay. And as far as the individuals,
14 Your Honor, you know, it's an exercise of reasonable
15 diligence of whether you knew or should have known you
16 had a claim. There's no dispute that they got the
17 budgets, Mr. Walbeck looked at them. If -- if -- if
18 these things -- well, we'll just leave it at that. It
19 was clear that this was what was being prepared for.
20 The Board certainly knew it.

21 There's evidence that the Board members were
22 even looking at the easement, studying the easements,
23 making change, trying to change the easement in 2004.
24 It was -- you know, someone who ultimately was
25 president of the Board.

1 THE COURT: How would you address any argument
2 that the rental was for the use of the improvement on
3 the property, that the Creek Club building itself, as
4 opposed to the dock use and the other parts of CV-6,
5 that the landowners say they were entitled to fee
6 simple?

7 MR. DUFFY: Because there are two line items, one
8 for one and one for the other.

9 THE COURT: Okay. All right. I'm sorry. I didn't
10 mean to interrupt you.

11 MR. DUFFY: Your Honor, the minutes obviously
12 are -- we didn't go through all of them, but they are
13 replete with evidence that the -- they were told in
14 2004, when there were questions by Mr. Graham, we own
15 this. There's an easement.

16 Then that came up again, which I pointed out in
17 the opening at least, where Mr. Wilcox, I believe who
18 was the president, said, hey, they own it, but guess
19 what -- if they sell the Creek Club -- and I believe
20 this was maybe '06 -- I can't promise the date there,
21 Your Honor, when he was there -- but if they sell the
22 Creek Club, which they are obviously considering --
23 they know they don't own it, they might sell the Creek
24 Club, this agreement will still hold.

25 They knew everything all along, there's just no

1 -- there can't be, in my mind, Your Honor, I don't
2 think a question about it.

3 And in addition, there are other ones where
4 they -- they even say, look, when the developers finish
5 building, we don't have to buy the Creek Club. I mean,
6 they -- that was a question, do we have to buy this.
7 No, you don't have to buy it. They might sell it, but
8 it doesn't have to be us buying it.

9 Now, so that -- the offer became much more
10 specific in the 2007 timeframe of, we'll sell it to you
11 for this, as part of this deal -- it's all, you know, a
12 more involved process, but it was very clear that they
13 were selling the property that did include the docks
14 and the boating facilities were for sale, and that's --
15 that's more than three years before any arguable claim
16 was brought by Mr. Walbeck first. And, of course, we
17 contend that that's not a derivative action anyway.
18 But in any event, it was well before the three years.

19 To the extent, Your Honor, of addressing the
20 seal, that -- I understand that's -- that's a bit all
21 over the map, but the point at least is, that's just a
22 contract claim. Everything else doesn't get a seal
23 argument.

24 I would like to step into the derivative
25 action --

1 THE COURT: Okay.

2 MR. DUFFY: -- because I think that's a really
3 important issue, Your Honor.

4 THE COURT: Okay.

5 MR. DUFFY: First of all, the Assembly is now a
6 plaintiff. That's a big issue. The latest complaint
7 isn't a derivative complaint, because it's not
8 verified. The claims are different since the
9 settlement. The Assembly has embraced them in writing
10 and -- and the Assembly has embraced the claims.

11 There is no demand for any of those claims since
12 the settlement. In fact, it is about a decision the
13 Board entered -- an agreement the Board entered into
14 that they are claiming damages from, and the Board is
15 on record for accepting everything the plaintiffs say.
16 There is nothing the Board has denied or been
17 demanded -- there's nothing that has been demanded of
18 the Board that they haven't done. Any claim related to
19 any damages after -- that are related to the
20 settlement, cannot be a derivative action.

21 Let's see. They have -- Mr. Walbeck doesn't
22 even contend that he -- that the rule requires that
23 plaintiff make a derivative demand and verify the
24 complaint, which is another issue -- because we have
25 evidence -- testimony, that they verified things that

1 they had no idea were true or not true. They hadn't
2 gone out and asked anybody else, whether people beyond
3 the report period, got the original report as Ms.
4 Adkins claims. They didn't go out and ask anybody else
5 if they relied on this. They didn't talk to anybody
6 else. So it's the two of them, but they allege that,
7 which was key, to be able to claim this was a
8 derivative action and survive the early motions, and it
9 was false. They did not know the facts that they
10 verified.

11 THE COURT: Let me ask you this question: This is
12 what I struggle with in many of the developer lawsuits
13 that we've got. How do you handle the issue of a
14 developer controlled or a developer run Assembly or
15 Board, a veto power there, if you are ever trying to
16 get a so-called derivative claim or class claim against
17 an entity that's always going to argue, you can't force
18 me to sue myself, or you're never going to be able to
19 get everybody on board. Because as we saw from the
20 brunette lady from Nantucket, somebody is going to have
21 business contacts with somebody -- how are the
22 homeowners to handle that ever, to get action by the
23 developers?

24 MR. DUFFY: Sure. One thing for certain they have
25 to do is allege with particularity that -- why it's

1 futile, that they gave these things to the Board and
2 here's why -- Your Honor, it's not just we asked the
3 Board and the Board didn't do it, it's the Board
4 shouldn't be allowed to make the decision, and here's
5 why the Board shouldn't be allowed to make the
6 decision, and that wasn't alleged.

7 THE COURT: Is that not part of the breach of
8 fiduciary duty claim, or is that different? They are
9 just talking about the fiduciary duty of the developer
10 at this point in the fourth amended complaint?

11 MR. DUFFY: Well, that would be the unverified
12 one. And I'm sorry, I don't know the specifics of
13 that, but they did not indicate why something was -- in
14 fact, Your Honor, the fourth amended one, they even
15 say, demand would have been futile, which is a
16 concession that is no longer, because the Assembly is
17 there. And so any new claims, for sure, are not
18 derivative.

19 But in any event to Your Honor's point, the
20 control issue is, you know, it's the allegation when --
21 well, let's put it this way: The control of the Board
22 has been acknowledged to be late -- transferred at the
23 latest at the end of December, 2005.

24 THE COURT: Okay.

25 MR. DUFFY: Our contention is because it was a

1 majority, non-developer representatives in December
2 2003, including the finance committee by the way, who
3 wrote the budget and paid these bills, they have their
4 own independent fiduciary duties. To suggest that
5 because the developer got them on the Board means that
6 they were controlled by the developer, totally
7 undermines the rest of the law with regard to these
8 associations and what people's duties are. So our
9 contention is, it was significantly earlier that
10 control was transferred.

11 Now, what -- what you asked about with the veto
12 power, that there was some suggestion that these
13 covenants allowed them to do -- you know, to -- to
14 change things or -- well, that's -- there's been no
15 exercise of that, so how can you claim there's been
16 control when that didn't stifle anyone from doing
17 anything. So I hope that --

18 THE COURT: No, that helps. That helps.

19 MR. DUFFY: -- what Your Honor is asking. As far
20 as the continuing along the derivative action, I
21 suspect the reason Ms. Adkins was joined later was to
22 try to perfect the derivative action that had been
23 objected to when Mr. Walbeck knew he never asked
24 anything. So Ms. Adkins comes in and says, I made a
25 demand. Her demand was a letter to the lawyer asking

1 him to investigate. That is not putting the facts
2 before the Board and demanding action on behalf of the
3 Assembly. That fails as a derivative demand.

4 Now, Ms. Templeton, they try to rely on Ms.
5 Templeton's letter, which they made very clear, Ms.
6 Templeton settled her claims after that letter -- to
7 begin with. But on top of that, it goes --

8 THE COURT: Well, that claim was just the -- I'm
9 going to sue you if you pursue the zoning issue, wasn't
10 it? I mean, wasn't that part of the settlement -- even
11 though you live three doors down from the Creek Club,
12 where the trollies are going and they're rolling past
13 your house, and trouncing through the yards as they
14 walk down through CV-5 -- she just backed down to that
15 suit threat.

16 MR. DUFFY: The release of all claims --

17 THE COURT: Okay.

18 MR. DUFFY: -- which came out in evidence. But in
19 any event, Your Honor, the point of trying to rely on
20 the Templeton demand is, first of all, she's not a
21 plaintiff --

22 THE COURT: I'm not relying on the Templeton. I
23 just found it interesting and -- well, I'll just leave
24 it at that. I found it interesting.

25 MR. DUFFY: Thank you.

1 THE COURT: One day I'll learn to stop talking and
2 just let the record -- let y'all argue, but that's not
3 going to happen anytime soon probably.

4 MR. DUFFY: Well, Your Honor, I'll leave the
5 Templeton demand alone, but the Adkins demand is
6 clearly inadequate. There is not a derivative action
7 triggered.

8 And I touched on the point earlier, but I just
9 want to make it clear that even if you make -- you --
10 even if you make a demand, the point is that the Board
11 didn't do what I asked them to do, the Board should not
12 be entitled to make the decision; they're biased;
13 they're this; they're that, and the other. And there's
14 nothing -- I don't believe there's anything adequate
15 that addresses that in any verified complaint.

16 THE COURT: I guess we don't have our sign on the
17 door, or anybody out there right now to keep this from
18 happening.

19 (Pause.)

20 MR. DUFFY: I would like to point out, Your Honor,
21 I think there is an issue about having antagonistic
22 interests, I think -- you know, earlier Mr. Bouch
23 obviously represented to the court that it was the
24 Assembly's interest for the easement being perpetual,
25 and it was obviously the plaintiffs --

1 THE COURT: Right. And I have read the
2 transcript. I remember what happened that day. And
3 it's -- the record is muddled, I guess, is a nice way
4 to put it.

5 MR. DUFFY: Your Honor, the -- I'll move -- I'm
6 trying to be a little quicker because we filed the
7 brief. The -- well, one thing that's clear, also, and
8 I expect may be conceded -- there's certain claims that
9 cannot be derivative, just by their nature. The
10 Interstate Land Sales Act can't be derivative, Unfair
11 Trade Practices Act can't be derivative.

12 Now, Mr. Whitaker will address why many others
13 in substance can't be derivative, but just based on the
14 law, those cannot be derivative actions.

15 MR. LUCEY: We're not proceeding derivatively on
16 the --

17 THE COURT: Okay. So not proceeding derivatively
18 on Interstate Land Sales Act claim or Unfair Trade
19 Practices Act claim; correct?

20 MR. LUCEY: Yes, Your Honor.

21 THE COURT: Thank you. That helps.

22 MR. DUFFY: Your Honor, there's a damages issue on
23 Interstate Land Sales Act, which is that the damages
24 are not -- you are not entitled to get -- benefit of
25 the bargain is not what that is about. It's caused you

1 some loss in value, and I don't think there is any
2 evidence that suggests that there is. The Fitzgerald
3 case, we cite, is on that, Your Honor.

4 The other point I think Your Honor knows well,
5 is the effort to extend the fiduciary duty to the
6 developer in this case, I think, is unprecedented. I
7 think that --

8 MR. LUCEY: We are not proceeding on individual
9 breach of fiduciary duty claims also, Your Honor --

10 THE COURT: Just the breach --

11 MR. LUCEY: -- only association derivatively by
12 the individuals.

13 THE COURT: Okay.

14 MR. LUCEY: It's a derivative claim only. Thank
15 you.

16 THE COURT: Okay.

17 MR. DUFFY: Well, in any event, Your Honor, the
18 way I think of it is -- you know, in -- certain laws
19 get named for people and certain things -- like in
20 supports, a rule change gets named, like the Larry Byrd
21 rule -- I think this would be the Justin Lucey rule and
22 -- in all due respect -- this extension of a fiduciary
23 duty at -- you know, until whenever. The fiduciary
24 duty is recognized when you are handing -- turning
25 something over. You are turning over, it has to be in

1 good condition. That's the Dunes West case, not that
2 the -- if you think about giving something to someone,
3 you better do it. It would upset the entire
4 capitalistic enterprise of property development. If
5 you thought about having a tennis court, but put in a
6 club, you have breached your duty. You should have
7 given it to them. I mean, that's --

8 THE COURT: Well, I think that's -- I understand
9 that you are a zealous advocate on behalf of your
10 clients. It's a little different here, because it's
11 extremely arguable and probably for the jury to
12 determine whether it was a breach of fiduciary duty to
13 make all these representations, to sit in a position of
14 trust and confidence in some part. That's the issue
15 of the developer I'm going to need to know why there's
16 a fiduciary duty at all, and it's not just a breach of
17 contract claim.

18 But then to end up giving the landowners or not
19 giving them something, that has a sign on it for three
20 hours every Saturday, saying this is a private club,
21 you can't enter, when there's no question that was
22 never contemplated by anybody -- you know, obviously
23 this will be for the jury. But the testimony comes
24 across, taking it in the light most favorable to the
25 nonmoving party, that the developers were just going to

1 milk as much money as they could out of that parcel,
2 even if it meant barring these folks from using the
3 land that real estate agents used to sell the property
4 to them. And that's my concern, whether it's just a
5 breach of contract or a negligent misrepresentation, or
6 something more; or actually a fiduciary issue. That's
7 a legal issue I'm going to have to figure out, but I'm
8 going to have to do some more reading before I can do
9 that.

10 MR. DUFFY: I understand, Your Honor. I think it
11 would be a big extension and if -- and if I may, a
12 dangerous one to suggest that's a fiduciary duty all
13 the --

14 THE COURT: The problem we have -- and this is
15 something we're going to be struggling with, I think,
16 Judge Newman has dealt with it in the Magnolia case and
17 in the Pope case, when you have these entities that
18 purposefully entangle themselves with a Board of
19 Directors that is supposed to act on behalf of the
20 homeowners association -- this is just in general, and
21 not this case, and it leaves to these entanglements
22 down the line, but then they say, well, I don't have a
23 fiduciary duty. That's problematic. Granted, that
24 hasn't been the way of the evidence in this case that
25 has been presented, so it's less of a problem here than

1 other ones. But the law is going to have to adapt and
2 change to that.

3 Mr. Bouch's firm's Madison case that I'm no
4 longer involved in, is a huge example of that, but it's
5 a theme we are seeing all throughout.

6 So, I mean, you know, I sure don't want this to
7 be the case that establishes any doctrine -- I'd love
8 for y'all to settle it, but if I have to step out and
9 make some rulings because there's no law on this type
10 of situation yet, that may be what happens.

11 But this -- this is a problem. I don't know
12 that it was a breach of fiduciary duty, but I don't
13 have -- there's not enough for me to grant a directed
14 verdict on that -- at this point on that, but I will be
15 looking at it throughout the defense portion of the
16 case. So anyway.

17 MR. DUFFY: Thank you, Your Honor.

18 THE COURT: If it's in the brief, you don't need
19 to argue that part anymore. It's -- it's too muddy
20 right now. Okay.

21 MR. DUFFY: All right.

22 THE COURT: What's next?

23 MR. DUFFY: I'm passing the baton.

24 THE COURT: All right. I'm happy to hear from
25 you.

1 MR. WHITAKER: Thank you, Your Honor. And I'm not
2 going to say too much, because most of what I would say
3 is in the brief anyway, I'm just going to hit a couple
4 of highlights.

5 One is the issue of standing of individuals to
6 bring their individual claims. You know, "I, Brad
7 Walbeck", or, "I, Lea Ann Adkins", was directly injured
8 by these folks. And there's a lot of case law -- good
9 case law, especially the Brown case on -- that the
10 plaintiffs have to have a loss to themselves
11 individually and not to this entity that they are
12 shareholders in, to have an individual claim. This
13 claim is derivative that they are trying to bring, and
14 they haven't really shown any evidence of where they
15 have been injured individually.

16 THE COURT: Oh, they did. They did.

17 MR. WHITAKER: Okay.

18 THE COURT: They both testified about their
19 wanting to be a part of that property and sit on the
20 dock and overlook the water; and whether somebody has a
21 boat or doesn't have a boat, there's differently
22 standing individually.

23 MR. WHITAKER: All right.

24 THE COURT: That is not something I'm going to
25 have to study up on.

1 MR. WHITAKER: I understand.

2 THE COURT: But thank you.

3 MR. WHITAKER: One thing I didn't get in the
4 brief, but will mention this on civil conspiracy, as
5 you know for civil conspiracy, you've got --

6 THE COURT: You can stop -- isn't that out now,
7 since the individuals are out, civil conspiracy?

8 MR. LUCEY: Respectfully no, Your Honor. We
9 believe the precedent is that we, the plaintiff, can
10 choose which persons or entities to sue for civil
11 conspiracy.

12 THE COURT: All right. Well, let me throw it to
13 you this way.

14 MR. LUCEY: Yes, ma'am.

15 THE COURT: You've got an amalgamation claim,
16 right?

17 MR. LUCEY: Yes, ma'am.

18 THE COURT: You want to say they are all one in
19 the same?

20 MR. LUCEY: Yes, ma'am.

21 THE COURT: They all worked together.

22 MR. LUCEY: Yes, ma'am.

23 THE COURT: We have something called the Intra
24 Corporate Conspiracy Doctrine, which means a
25 corporation cannot conspire with itself -- are they one

1 in the same, or did they conspire with one another?

2 MR. LUCEY: Our allegation is that the I'On
3 Corporation conspired with 148 Civitas to damage the
4 plaintiffs, and they also conspired with others, Your
5 Honor, but not amongst themselves. I totally --

6 THE COURT: Okay. All right. We'll see about it.
7 All right. Let me -- let me hear the civil conspiracy
8 argument then.

9 MR. WHITAKER: And, Your Honor, I think both of
10 those things are ripe. My argument is a little
11 different, which is that they've got to plead and prove
12 special damages as a result of a conspiracy on top of
13 their other damages, and I haven't seen anything about
14 that.

15 THE COURT: Okay.

16 MR. WHITAKER: They also have to have a conspiracy
17 with specific intent to injure these Plaintiffs.
18 There's no evidence that they sat around around and
19 said, let's hurt Brad Walbeck. Let's hurt Lea Ann
20 Adkins. Let's hurt I'On --

21 THE COURT: No, they just wanted to make money. I
22 don't know that there was a specific intent to injure
23 anybody, and I don't know what the special damages
24 were. That's going to be something I need to hear
25 about.

1 MR. WHITAKER: The Unfair Trade Practices Act, as
2 you know -- and the Woodson case is very recent --
3 private transactions, it doesn't go to that. There has
4 to be some public harm. I think it's interesting here,
5 in particular, that these plaintiffs, in essence, want
6 the Club to be less available to the public than it is
7 now, not more, and that may be their right. But
8 there's no trade practices claim of saying that there's
9 some harm to the public because these folks own it.

10 THE COURT: You know, again, I'll have to look at
11 Woodson again, but the law is all over the place in
12 these developer claims and when the Unfair Trade
13 Practices Act could apply and when it could not.

14 I think it's arguable, but that when there are
15 150 people that signed a receipt on a Property Report,
16 that designates a parcel, arguably as something, and
17 then it becomes a let's bring 200 people in for a
18 wedding -- whether it be 200 cars or in a trolley or a
19 party bus, that's been repeated and is capable of
20 repetition.

21 Not to mention the fact that nobody touched on
22 this, and this may be because the town -- Mount
23 Pleasant Town Council or the BOZA -- you know, how a
24 civic use lot turns into a for profit wedding business,
25 I -- I don't understand, but nobody has argued that or

1 put that up as part of their case.

2 I don't know. I don't know that the Unfair
3 Trade Practices Act claim is going to be difficult
4 here, because of the repeated issues that were put into
5 evidence, in those 150 receipts; but talk to me about
6 that.

7 MR. WHITAKER: So it's -- they are still only
8 private wrongs, as I see it, under Woodson -- Your
9 Honor, of course will look at that --

10 THE COURT: So -- so it's always got to be a
11 private wrong? What about these people that sell a
12 lemon car to somebody -- isn't that a private wrong?
13 That's what all law on UTPA is, how is that different?
14 I'm asking for help, because I don't understand.

15 MR. WHITAKER: I understand. And I think we rely
16 on Woodson and the other cases to think that it's a
17 private wrong.

18 THE COURT: Okay. All right.

19 MR. WHITAKER: And rather than go through the
20 rest, I'll just rely on what the brief says --

21 THE COURT: And I am going to read the whole thing
22 before we bring the jury in. Some of my rulings I may
23 have to reserve until after the defense's case, some
24 I'm ready to make after I hear Mr. Lucey. But let me
25 just pull that case quickly and then I will have it for

1 whenever we finish arguing. All right. What else
2 before --

3 MR. WHITAKER: That's all, just the rest is in the
4 brief, Your Honor.

5 THE COURT: Okay. Yes, sir.

6 MR. LUCEY: Your Honor, in respect for the court's
7 indication and to streamline the case, the plaintiffs
8 are going to go ahead and withdraw the civil conspiracy
9 claim.

10 THE COURT: Okay. The civil conspiracy claim is
11 withdrawn.

12 MR. LUCEY: And I believe I have heard the court
13 make some rulings, so I shouldn't address --

14 THE COURT: No. Go ahead and argue -- put on the
15 record what you want to put on the record. And then
16 I'll -- you know, the defense will get the last word on
17 this because it is their motion, and then obviously I'm
18 incorporating their brief as part of the record.

19 MR. LUCEY: And like the court -- I actually
20 received that brief several minutes before the court
21 walked in --

22 THE COURT: That's fine.

23 MR. LUCEY: And I haven't been able to read it
24 while arguing -- Your Honor, first I would like -- I
25 want to go back in time to the -- to the early

1 comments. The court made a comment about the trigger
2 date.

3 The court may recall -- actually defense counsel
4 made that same comment to the jury during their opening
5 statement, they in fact told the jury that the trigger
6 date for the problem was the sale to the third party --
7 by their own words.

8 THE COURT: I don't recall that.

9 MR. DUFFY: The trigger of what -- of their
10 lawsuit was, that doesn't mean they weren't supposed to
11 bring it earlier. I mean, that's -- that's a bit of a
12 stretch I would say.

13 THE COURT: I agree.

14 MR. LUCEY: And to make several of the exhibits
15 the court asked about more clear, Your Honor, the
16 representation to Mr. Russo regarding the docks being
17 promised was the Fall of 2008.

18 THE COURT: Okay.

19 MR. LUCEY: Just -- just to put that in -- just a
20 slight better perspective, by the way, Mr. Russo and
21 his wife are, in fact, I'On homeowners. That is a
22 representation to an I'On homeowner. The
23 representation to the DNR, that they were about to
24 transfer the docks --

25 THE COURT: To the homeowners?

1 MR. LUCEY: -- to the homeowners, South Carolina
2 DNR, that was in April of 2008, Your Honor. I'm going
3 backwards -- I should be going forward.

4 THE COURT: No, that's okay.

5 MR. LUCEY: But to stay in this direction, Your
6 Honor, what the court hasn't really heard about much in
7 testimony, because it's already in evidence in a
8 stipulated exhibit, is -- is in the Fall 2007 Board
9 minutes, where Chad Besenfelder says to the
10 association, we are ready to turn over the docks. And
11 the association says, great, but they're not ready.
12 Please get with Ward Mundy. Go over the condition of
13 the docks and let us hear your proposal on that.

14 And Mr. Chad Besenfelder doesn't get back to the
15 Board immediately, apparently. But what we do see
16 emanating, is five months later the letter to the South
17 Carolina DNR saying, we're about to transfer the docks
18 to the association.

19 And then finally they come full circle, Your
20 Honor, come back into the future, May 25th, 2009, is
21 the date of the Chad Besenfelder e-mail to the Board of
22 Directors where he says: One, the deal has fallen
23 through; and, two, we are in the process of
24 transferring these docks to you.

25 And contrary to the evidentiary assertions the

1 court heard ten minutes ago, that e-mail specifically
2 says we are subdividing a parcel of land to transfer
3 with the docks, Exhibit 58. Because that's always been
4 implicit with the dock ownership, is that you had to
5 own land to get there.

6 THE COURT: That's Plaintiff's 58?

7 MR. LUCEY: Plaintiff's 58, Your Honor.

8 THE COURT: Okay.

9 MR. LUCEY: With regards to developer control,
10 Your Honor. The developer -- we saw was in control at
11 the time the easement was executed. We saw Joe Barnes
12 execute for all three entities, including the Assembly.

13 The testimony is, is that the Board of Directors
14 was in developer control and headed by president
15 Legrand Elebash, an I'On Company employee, through
16 2005.

17 It was mid 2005 that a handover agreement was
18 executed, whereby the parties agreed on a process for
19 transferring amenities to the association in the future
20 where they would be inspected, repaired and turned
21 over.

22 In evidence in some of the Board minutes, Your
23 Honor, is that that amenity process was still on-going
24 into 2010, 2012. In fact, at the time we took several
25 depositions in this case, a canal known as the

1 Jefferson Canal, still had not been transferred and
2 various other things, so this was an on-going amenity
3 transfer process that was going on, and there's no
4 reason that the Assembly and the homeowners couldn't
5 trust this on-going transfer process.

6 Going back to the developer's control, Your
7 Honor, that dock transfer representation occurs in the
8 Fall of 2007, within two years of -- in the developer's
9 control. In fact, though, the developer still
10 controls. They have the veto power until 2018.

11 Mr. Duffy would like to call it the Lucey Rule;
12 I would like to call it the Graham Rule. We are going
13 to be -- retain control of I'On until 2018. That's
14 what -- that's what the disclosure says, and if we go
15 to the CCRs, which are also in evidence, they will
16 reflect their control.

17 Not only do they retain veto power, they retain
18 power to appoint a Board member, which they did by
19 compulsory process in January of 2014, just six months
20 ago. They put one of their employees, Chad
21 Besenfelder, back on the Board, indicating a strong
22 developer control in this neighborhood.

23 And if I didn't already say, Mr. Tom Graham did
24 not deny that he previously testified under oath that
25 his veto power was like being in the Supreme Court, and

1 it can't get much stronger than this -- in this country
2 than our respected Supreme Court.

3 Moving on to the issue of derivative actions,
4 Your Honor, and representations -- before going to the
5 derivative action, I would remind the court, first,
6 that it was a March 11, 2009, Kinney letter -- Kinney
7 demand letter that went to the Grahams, to the I'On
8 Company, demanding the transfer of the docks and the
9 information on the alleged Creekside Park.

10 Mr. Walbeck was present when Ms. Templeton made
11 her demand on behalf of the homeowners, that the Board
12 procure these amenities in February of 2009.

13 Mr. Walbeck's later written demand of his own was, in
14 fact, directed to the Grahams directly -- to the I'On
15 Company directly. It was then forwarded to the Board,
16 and the Board was copied on the Graham response to Mr.
17 Walbeck, so the Board was aware of Mr. Walbeck's
18 demand.

19 THE COURT: The Vince Graham response?

20 MR. LUCEY: Ma'am?

21 THE COURT: The Vince Graham response, the letter?

22 MR. LUCEY: Yes, ma'am. And that would be Exhibit
23 62 -- 72, Your Honor. And in their argument -- on
24 directed verdict, in their argument, the defendants
25 mixed in some aspects of the pleadings. We did, in

1 fact, plead representative demand; that we were present
2 during the demands; that the demands were made on
3 behalf of the homeowners. Ms. Adkins made a demand.
4 And, in fact, we went on to plead futility, because we
5 knew these demands, we saw these demands, and the Board
6 didn't do anything about it.

7 And, in fact, by the time that this finally came
8 to fruition, with the trigger on August 5, 2009, the
9 horse was out of the barn and apparently the Board
10 appeared powerless to secure these -- to secure these.

11 I would also note to the court, I believe the
12 Board was also copied on the I'On Company demand to --
13 excuse me -- the I'On Company response to the Tisdale
14 demand that was made, so we have pled both the efforts
15 at causing the association to act, and the futility of
16 further efforts of causing the association to act at
17 length, and we have put in -- dozens of aspects of
18 testimony and evidence that support those allegations
19 over the past several days.

20 THE COURT: Okay.

21 MR. LUCEY: We have shown the court loss in value,
22 that was an allegation they made with regards to the
23 ILSA claim. And as I understand ILSA anyway, although
24 the jury would decide whether there's a ILSA violation,
25 it's the court that's going to decide the damage under

1 ISLA anyway. I may be wrong, but that's how I read the
2 statute, Your Honor.

3 THE COURT: Let me ask y'all this question, so the
4 statute of limitation issue is obviously going to be
5 critical; is that an issue of law for the court, or at
6 some point is there a jury question in there about the
7 operation and statute of limitations?

8 MR. LUCEY: Your Honor, it's my understanding --
9 unless there's no evidence supporting plaintiff's --
10 plaintiff's position on the statute of limitations, the
11 statute of limitations itself is an issue for the jury.
12 And I believe there's dozens and dozens of South
13 Carolina cases that I'd be happy to bring those to your
14 attention.

15 THE COURT: I'm throwing that out there.

16 MR. DUFFY: I think, generally, that's accurate,
17 Your Honor, unless it's obvious when the claim started,
18 provided by the evidence.

19 THE COURT: Okay.

20 MR. DUFFY: I will say that -- I lost my point --
21 I'm sorry.

22 THE COURT: That's okay. I'm making y'all jump
23 around. I'm sorry.

24 MR. DUFFY: All right. Oh, yeah. Thank you,
25 Seth. The equitable issue is whether it's tolled is

1 for the court, not for the jury.

2 THE COURT: Right. Thank you.

3 MR. LUCEY: Yes, Your Honor. And several other
4 factual issues I'm going to hit on because I haven't
5 had an opportunity to read their brief, but I want to
6 make sure that it's clear to the court. With regards
7 to Ms. Adkins' breach of contract claim, Your Honor,
8 that is being brought in a third party beneficiary
9 capacity; that she -- she and the Assembly are both
10 third party beneficiaries of all the homeowner
11 contracts that said that that property would be
12 transferred to the Assembly, and the homeowners would
13 have the benefit of it. So the Assembly would have the
14 benefit of title; that's its third party benefit, and
15 the homeowners' third party benefit is the benefit of
16 unrestricted access and use.

17 And with regards to Ms. Adkins' ILSA claim, Your
18 Honor, the paragraph -- the disclaimer paragraph in her
19 contract can't supersede federal law. The ILSA
20 evidence in front of the court is that this project was
21 registered under ILSA, with the federal government, and
22 that registration was not withdrawn until 2009.

23 So the unrefuted evidence in this case, until
24 they put something up, Your Honor, is that she was
25 handed a copy of that report, and that report said to

1 her, I must hand this to you as a matter of federal
2 law. And -- and this is registered in Washington, D.C.

3 Now, they may have, in fact, inadvertently
4 handed her the wrong report. That might be what
5 they're going to try and put up, but the evidence right
6 now is they handed her that report.

7 There is collaborating evidence in the record,
8 Your Honor, that she is not the only one that got
9 handed an outdated report. The last six receipts in
10 Exhibit 150 postdate the amended report. That's six
11 other people that got handed -- at least that we know
12 of -- that got handed an outdated report.

13 Another factual -- a factual legal issue I'd
14 like to bring to the Court's attention is the issue of
15 fraud negligent misrepresentation. To whom were these
16 representations made? What was the reliance? I would
17 agree with what the defendants would probably argue
18 that in the first instance, that is a claim that would
19 belong to individuals, not the Assembly, at the first
20 instance.

21 But as we see through the evidence -- in the
22 evidence, over the years, the defendants began making
23 these representations to the Assembly itself, and they
24 repeatedly made those representations, so now the
25 Assembly also shares those claims with the individuals.

1 With regards to the promissory estoppel, Your
2 Honor, that's for the court later anyway. But we
3 believe all three parties -- the derivative association
4 and the individuals have a valid claim on that and have
5 put in evidence to support it.

6 THE COURT: Well, aren't certain of those
7 equitable contract claims that can't coexist with the
8 breach of contract, right? It's one or the other?

9 MR. LUCEY: Yes, Your Honor. It would -- if
10 the -- if the jury found a breach of contract that
11 would evaporate, there would be nothing left for the
12 court to decide on that.

13 With regards to the unjust enrichment, Your
14 Honor, again all three parties have it, they testified
15 that they have been harmed too. They paid for the
16 lots. The developer got the money for the lots. They
17 didn't get one of amenities that they were supposed to
18 get with that.

19 The amalgamation, Your Honor, we focused on the
20 April 2008 e-mail to the DNR to explain to the jury
21 amalgamation. And we didn't go through a hundred more
22 e-mails. But throughout those e-mails -- I'm going to
23 guess there's 80 of them in evidence -- throughout
24 those e-mails it's always -- or almost always -- many
25 times -- the I'On Group, Inc. acting on behalf of the

1 I'On Company or the I'On Club, acting on behalf of the
2 other entity.

3 And we even saw Exhibit 109, I believe it is,
4 the Olde Park contract with the I'On Company is making
5 contractual obligations for allegedly an independent
6 entity, the I'On Club. And we believe there's more
7 than adequate evidence of that for the amalgamation --

8 THE COURT: Well, isn't also in evidence the --
9 Joe Barnes signed three different entities, as well as
10 attempts to transfer easement rights that one
11 corporation doesn't have yet, because it hasn't
12 transferred it to the other?

13 MR. LUCEY: Yes, ma'am.

14 THE COURT: Okay.

15 MR. LUCEY: Yes, ma'am.

16 THE COURT: That -- I'll look at the brief as
17 well, but I'm pretty comfortable on the amalgamation
18 claims under Pope and Magnolia.

19 MR. LUCEY: Yes, ma'am. Then briefly, the
20 plaintiffs do assert that Exhibit 115 A, the chart of
21 property receipts and Exhibit 150, the collection of
22 property receipts clearly shows the repeated impact
23 upon the public. This happened in the repetition.
24 This happened again and again. And we also put in
25 evidence that these defendants are professional

1 developers. They can repeat this in the community.

2 As to the -- there was one other matter -- I
3 apologize -- the court's indulgence for one second --
4 as to the statute of limitations, Your Honor, we
5 briefly touched on that in several different ways.
6 There's one other point I like to make to the court.

7 Yes, the issue regarding the seal, to the extent
8 it matters, Your Honor, we believe there's a question
9 for the jury, because the case law governing whether or
10 not it's a sealed instrument, requires the finder of
11 fact to determine the intent of the parties. The
12 intent of the parties would be a jury question.

13 And, Your Honor, not only is the Walbeck
14 contract sealed, it's sealed in three different places.
15 And we would respectfully submit to the court, under
16 the controlling precedent, that there can be no dispute
17 that that's a sealed instrument.

18 THE COURT: Is that Exhibit 2?

19 MR. LUCEY: Exhibit two, Your Honor.

20 THE COURT: Okay.

21 MR. LUCEY: And, of course, we show that that was
22 a standard I'On form contract drafted by I'On. The
23 implication is the other hundred or so property receipt
24 contracts are also triple sealed.

25 And, Your Honor, I bring to the court's

1 attention that the Property Report in this case is
2 sealed. And that was shown to the jury. It's not
3 sealed as many times as the contract, and that might be
4 more of a question for the jury. But it was, in fact,
5 sealed.

6 And the Property Report itself, it's not just a
7 basis for an ILSA cause of action, it's also a written
8 representation that can be a basis for a number of
9 other causes of action, in which it is part of the
10 negligent representation. It is a part of the fraud.
11 The Olde Park deal was negotiated when that Property
12 Report was handed out. It was false the day it was
13 handed to Mr. Walbeck, so the representations in that
14 Property Report, Your Honor, apply to more than one
15 cause of action.

16 Thank you, Your Honor. I'm happy to address, in
17 more detail, any particular point the court would like
18 to hear on.

19 THE COURT: Nope, not right this second. Thank
20 you though. Okay. Mr. Whitaker or Mr. Duffy.

21 MR. DUFFY: Thank you, Your Honor. I'm just going
22 to run through a few points in response.

23 Mr. Lucey indicated that there were -- in 2008,
24 there were e-mails to third parties, not homeowners,
25 saying that the I'On Company was going to -- was

1 preparing to deed the docks -- hand the docks over.
2 And Mr. Lucey is trying to rescue the Creek Club and
3 the CV-6 argument by saying they are going to subdivide
4 a parcel to be able to get to those docks. Well,
5 that's another example that you're not getting that --
6 the rest of it, which is what they are claiming. So,
7 clearly, they weren't given -- even based on the other
8 representations that were alleged.

9 And Mr. Lucey made a point about an on-going
10 amenities transfer, and that that somehow would be a --
11 lulling people into -- into not asserting their rights.
12 Well, when they -- when they're offering to sell it to
13 you, again, you know -- repeatedly in 2007, then
14 there's no -- you can't suspect that it's going to be
15 handed to you. That's pretty clear.

16 The effort to talk about control because a Board
17 member was appointed, a Board member -- one of seven --
18 whatever it is -- certainly doesn't equal control and
19 in practice it certainly doesn't -- because he's been
20 excluded from all the meetings -- he doesn't have
21 anything to do with developers, that's clearly -- it's
22 not but --

23 THE COURT: But is the veto power still there
24 until 2018 if they wanted to use it? I'm just curious.

25 MR. DUFFY: Whatever is in the covenants, Your

1 Honor, I'm not -- it's not been used -- it just hadn't
2 been there -- it hasn't been used at all, so I don't
3 know, to be honest -- I just don't know if it's there.

4 THE COURT: Okay.

5 MR. DUFFY: And then the effort to rescue the
6 derivative action by a demand letter, that -- the Board
7 of Directors sent to the I'On Company, the Kinney
8 letter to I'On, that's not the process.

9 First of all, you have to make a demand on a
10 Board, the plaintiff does; but that's showing that the
11 Board is making a demand on the developers. So to
12 suggest that the Board isn't doing what it's supposed
13 to do because it's demanding something that you want
14 them to demand, is an interesting way to rescue the
15 failure to have a derivative demand.

16 Let's see -- there were other discussions of
17 Walbeck writing the Grahams or the I'On Company, the
18 demand is on the Board. The demand is on the Board,
19 not on the defendant.

20 THE COURT: What's the date of Mr. Bouch's letter
21 back to Mr. Walbeck, saying thank you for the
22 information -- or which exhibit is that?

23 MR. DUFFY: Defendant's 31, March 11 -- March 10
24 or 11.

25 THE COURT: All right. I'll take a look at it.

1 MR. DUFFY: Let's see -- and the futility
2 conclusion again, is that the Board shouldn't be
3 allowed to make the decision -- not that they don't do
4 it, that they don't agree with you -- that they
5 shouldn't be allowed to make a decision.

6 I believe Mr. Lucey conceded that the Adkins'
7 individual contract claim is out, because she's now --
8 she's a third party beneficiary somehow so...

9 THE COURT: Is it?

10 MR. LUCEY: No, ma'am. She's brought a third
11 party beneficiary contract claim. Thank you.

12 THE COURT: Okay.

13 MR. DUFFY: Okay. Well, in any event, the -- the
14 issue about whether the Interstate Land Sales Act still
15 applied to her contract is an issue for them to prove
16 that the requirements of the Interstate Land Sales Act
17 apply to her purchase. And they have zero evidence to
18 suggest or even argument that it does, other than to
19 say, oh, well, the registration was still there, even
20 though you said that it's not. That it doesn't cover
21 this contract. They don't specify under the Act that
22 it -- it applies based on the many different factors
23 that govern Interstate Land Sales Act, and that's their
24 burden.

25 As far as the outdated report issue, what Mr.

1 Lucey is referring to, is that the Property Reports
2 changed -- they were updated. And when you contracted
3 and closed, is when you got the receipt. And people
4 who closed or contracted at some point -- anyway, there
5 are a few months where they got the report that was,
6 you know, in that timeframe -- there's no one else who
7 suggests that after the second amended report, some
8 number of months or years afterwards, that the first
9 report was given to someone. They're just suggesting,
10 hey, this lagged along in stages; not that once you
11 quit giving them out to everybody, you reached back and
12 got the first and gave it to them -- to somebody else.
13 The only one who claims that is Ms. Adkins.

14 Let's see, the fraud and negligent
15 misrepresentation, they are trying to rescue for they
16 -- saying the Assembly has those claims because of what
17 happened later, well, there was no demand on the
18 Assembly, that I understand, based on those -- those
19 issues.

20 Let's see, unjust enrichment isn't derivative.
21 There's no benefit conferred by the Assembly on the --
22 on the defendants, which is part of that -- part of
23 that claim.

24 As far as amalgamation is concerned, Your Honor,
25 I just point out, I don't think shared personnel is

1 sufficient to do that. I understood Your Honor's other
2 point, but at least the fact that somebody was
3 e-mailing and happened to be doing something for both
4 sides doesn't establish amalgamation --

5 THE COURT: No, that's not in and of itself
6 enough, but there are other indicia here, I believe.
7 Yes, sir.

8 MR. WHITAKER: Very, very quickly, just a couple
9 of other things.

10 The third party beneficiary, the case law is
11 pretty clear, it's got to be a clear intent by the
12 contracting parties to benefit the third party. The
13 Assembly may be a closer case, but it's difficult to
14 say that Mr. Walbeck, when he contracted with the I'On
15 Company, they meant to benefit Ms. Adkins, who bought
16 two years later, specifically by what they agreed at
17 that time.

18 And then the fraud claims go -- there was some
19 mention of an Olde Park issue -- and I think it's
20 important to point out that there's no fraud regarding
21 what rights Olde Park was going to have, it's not plead
22 in the complaint. There is a 9 B issue with that,
23 first of all. And then in addition, I'm not aware --
24 and, you know, maybe I missed it, but of any evidence
25 on, that there was some specific injury to the

1 plaintiffs because Olde Park people can use the
2 facilities.

3 THE COURT: Well, the possibility of having 815
4 more boat owners there, on what was supposed to be
5 their property --

6 MR. WHITAKER: I think it was 115, but I certainly
7 see what you're saying.

8 THE COURT: Wasn't it 115 up to 815 -- where did
9 the 815 come from or --

10 MR. DUFFY: Total members of the Club --

11 THE COURT: Itself? Including the I'On --

12 MR. DUFFY: Right. And the 115 reserved for Olde
13 Park.

14 THE COURT: But anybody else that lived in
15 Molasses Creek or Hobcaw, or wherever, that wanted to
16 join the Club, they capped the nonmembers at 815; is
17 that how it works?

18 MR. DUFFY: I think it's total members, Your
19 Honor.

20 THE COURT: Okay.

21 MR. WHITAKER: That's the only things I have.
22 Thank you.

23 THE COURT: All right. All right. Y'all give me
24 a few minutes to take a look at this, we'll be at ease
25 about 10 minutes. I'm going to get the jury -- let

1 them know we are still working. And then -- because
2 they don't like it when you leave them back there
3 without letting them know that you're, at least, aware
4 that they are back there. So y'all be at ease for
5 about 10 minutes, and then we'll come back and I will
6 let you know where I'm headed. I think I kind of
7 already have, and you're getting ready for the next
8 witness. Mr. Lucey, do you want to rest in front of
9 the jury, or do you want me to just let them know when
10 we bring them, the plaintiff has rested.

11 MR. LUCEY: I'm happy to let -- to have the court
12 let them know, Your Honor.

13 THE COURT: All right. Thank you. We'll be at
14 ease for about 10 minutes.

15 (WHEREUPON, a brief recess was taken.)

16 THE COURT: Okay. I have a couple of questions.
17 The statute of limitations claim is going to go -- I'm
18 going to let the jury decide that. I agree with you
19 all, I do think that's an issue for the jury. There
20 are too many facts -- the plaintiffs have, at least,
21 met that burden to get that far.

22 On the fiduciary duty claim, I have a question
23 Mr. Duffy and Mr. Whitaker from your brief -- sorry --
24 at page 25, you are quoting the -- the Concerned Dunes
25 West case, "The developer of a planned unit development

1 owes a duty to the HOA to turn over common areas that
2 are not substandard, and that are in good repair.
3 Failure to do so, subjects the developer to liability
4 for bringing the common areas up to standard". Okay.

5 MR. WHITAKER: Yes, Your Honor.

6 THE COURT: It's in your brief. Well, what about
7 not turning it over at all? I'm just --

8 MR. WHITAKER: There's -- I'm not -- no cases held
9 that that's a duty. And I believe that's a contractual
10 issue, it's not a fiduciary duty issue. As I
11 understand it, that all Concerned Dunes West actually
12 holds is that if you turn a common area over, it has to
13 be up to standard. Now, whether the duty should be
14 expanded is an issue of law that's -- it's a novel
15 issue. I understand that. But the actual duty, those
16 cases recognized are limited to that.

17 THE COURT: Okay. Mr. Lucey?

18 MR. LUCEY: Your Honor, it not an extension of law
19 at all.

20 THE COURT: No, I don't see that.

21 MR. LUCEY: The Dunes West came after the Goddard
22 case, when the Goddard case actually was a new case --
23 the Goddard case applied corporate promoter fiduciary
24 duty principles to homeowners associations and
25 neighborhoods. And it's actually applying fiduciary

1 duty principles that are embedded in South Carolina law
2 hundreds of years. They just looked at it in a
3 different factual context than looked at it before.
4 And so, Your Honor, the court has clearly held that the
5 developer of a neighborhood, of a subdivision, of a
6 HUD, similar to the developer of a company, owes a
7 fiduciary duty to the neighborhood that will emanate
8 from his development, and the residents of that
9 neighborhood. It's a very broad duty, Your Honor, and
10 we believe we've put on ample evidence of the violation
11 of that duty.

12 MR. DUFFY: Your Honor, if I might -- just to
13 touch on a point that you raised --

14 THE COURT: Sure.

15 MR. DUFFY: I think what you are suggesting is
16 whether you turn it over at all. There has to be a
17 trigger point that gives that duty, which is a
18 contract. Otherwise, as I mentioned before, if you
19 think about a tennis court and make it private, then
20 you have breached that duty. But if -- though, you
21 have to go back, what is required to give over, and
22 that's a contract issue, not a fiduciary duty.

23 THE COURT: Right. I agree, it's a contract
24 issue, but I'm going to have to read Dunes West again,
25 because I guess my point is, I don't see it as that

1 great of an expansion. I need to reread Dunes West to
2 see, well, if they never turned over the common areas
3 that were substandard, they wouldn't have violated the
4 duty because then the POA wouldn't have been
5 responsible for taking care of the substandard areas.
6 I mean, I guess that's the argument Mr. Whitaker is
7 making. I'm not sure it's quite that narrow, but I
8 will look at it again. Okay. So I -- that claim is
9 under advisement.

10 The Interstate Land Sales Act claim is likely
11 not going to make that to the jury, but I'm going to
12 keep that under advisement as well.

13 At this point, the motion for directed verdict
14 is denied as to the other arguments, but certainly
15 incorporating your brief into the record. Okay.

16 So you all need a quick break before your
17 witness is ready to put up or are we ready to roll?

18 MR. DUFFY: We're ready, Your Honor.

19 THE COURT: Everybody ready for the jury? Okay.
20 Thank you.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 11:00.)

23 THE BAILIFF: The jury is all present and seated,
24 Your Honor.

25 THE COURT: Thank you, ma'am. And thank you

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1 ladies and gentlemen, for your patience. The plaintiff
2 has rested -- the plaintiffs have rested their case,
3 and we are ready to proceed with the defense's case, so
4 I will call on Mr. Duffy, Mr. Young to call their first
5 witness -- or their next witness, since we've had a few
6 out of order.

7 MR. YOUNG: Thank you, Your Honor. The defense
8 calls Mr. Ed Clem.

9 THE COURT: All right, sir. If you'll come on up,
10 we'll swear you in. Thank you.

11 EDWARD CLEM, after having been
12 duly sworn, testified as follows:

13 THE CLERK: Thank you, sir. Please have a seat.
14 Please state your full name for the record, spelling
15 your last.

16 THE WITNESS: My name is Edward Clem, C-l-e-m.

17 **DIRECT EXAMINATION BY MR. YOUNG:**

18 Q. Good morning, Mr. Clem.

19 A. Good morning.

20 Q. Mr. Clem, can you tell us a little bit about
21 yourself; that is, where you live -- and let's start
22 with that -- where do you live?

23 A. I live in I'On at [REDACTED] [REDACTED] [REDACTED] [REDACTED] My
24 wife and I moved into our home there in I'On in April
25 of 2000, so we were one of the very early people in the

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1 development.

2 Q. Okay. And, Mr. Clem, do you work or are you
3 retired?

4 A. I am retired. I retired in 1998.

5 Q. And tell us, please, what you did before you
6 retired, what was your job?

7 A. I was vice president of environmental quality
8 for a Forrest (ph) Products Company. We made paper and
9 building products --

10 (Court Reporter interruption.)

11 THE COURT: Made paper and products?

12 MR. YOUNG: Building products.

13 THE COURT: All right. Sir, I'm going to ask you
14 -- I know you want to speak to the jury, but if you'd
15 kind of speak towards the middle of room, my court
16 reporter will be able to hear you better. Thank you.

17 THE WITNESS: Thank you.

18 BY MR. YOUNG:

19 Q. Okay. Mr. Clem, and when did you retire?

20 A. I retired in 1998.

21 Q. Okay. And, Mr. Clem, I want to put up behind
22 you -- or on the screen in front of you, we have some
23 exhibits, and I think you'll be able to follow them on
24 the screen, but if you would like a hard copy, let me
25 know. Let's put up Defendant's Exhibit 61, which I

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1 believe is a copy of your contract. Do you see that,
2 Mr. Clem?

3 A. I do.

4 Q. All right. And so did you buy a lot in I'On
5 in the early stages of I'On?

6 A. Yes. We bought a lot in 1999, March of 1999.

7 Q. All right. And at that time, were you also --
8 if you could put up 61 A -- did you also get a copy of
9 a 1998 Property Report?

10 A. This is my signature, indicating I received
11 that, but I do not recall receiving that report.

12 Q. Okay. But 61 A, that is your signature on
13 there indicating that a copy of the report was provided
14 to you in conjunction with the purchase of your lot; is
15 that true?

16 A. Yes, it is.

17 Q. But do I understand correctly you don't
18 remember reading the report?

19 A. I do not recall reading it at that time, no.

20 Q. At some other time, were you -- well, let me
21 go a little bit further -- did you eventually take a
22 role on the Board at I'On? Tell us about how you got
23 involved in the community at I'On?

24 A. In February of 2005, I was asked to serve out
25 a one year term of a two year term, an individual had

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1 resigned from the Board, so I was appointed to the
2 Board for one year.

3 In the Fall of that year, I ran for election and
4 was elected for a two year term, so that was in 2006
5 and 2007. So I was on the Board a total of almost
6 three years.

7 Q. Okay. So you were on the Board from 2005
8 or -- 2005 to 2007; is that right?

9 A. Yes.

10 Q. And during that time, did you go to the Board
11 meetings and participate in the Board meetings?

12 A. I attended most of the Board meetings that
13 were held at that time, yes.

14 Q. All right. And do you remember, were the
15 Board meetings normally -- were minutes kept at those
16 meetings?

17 A. It depended upon the time. In the very early
18 days, it was very sparse minutes kept. But as the
19 Board got larger, minutes were kept more adequately, I
20 guess you would say.

21 Q. Mr. Clem, let me put Defendant's Exhibit No.
22 113 in front of you there. They are minutes from
23 February 2005 that have already been admitted into
24 evidence. Do you see there where it says "members
25 present" at the top -- that it indicates you were

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1 present at this Board meeting?

2 A. Yes, it does.

3 Q. All right. And does that make sense to you
4 that you would have been at the Board meetings back in
5 February of '05?

6 A. Yes, as a matter of fact, that's the first
7 meeting that I attended as a Board member.

8 Q. Very good. Mr. Clem, if we could go down to
9 the third page -- well, first let me just ask you
10 generally -- do you remember when you got on the Board
11 and went to your first meeting in 2005, did y'all
12 discuss something called the Recreational Use Easement
13 and Cost Sharing Agreement?

14 A. I don't recall discussing it at that meeting,
15 no.

16 Q. Okay. Let me direct your attention to the
17 third page there, where it says "old business" -- if --
18 Lee Ann, if you could pull that up please -- Mr. Clem,
19 looking at the meeting minutes, does that refresh your
20 recollection at all about discussing some legal
21 documents back in 2005?

22 A. Could you tell me what is the date of this
23 meeting?

24 Q. Yes, sir. The date is February 9, 2005. I
25 believe it was your first Board meeting?

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1 A. Yes, I do.

2 Q. Okay. Do you remember at that time, as
3 reflected in the minutes, presenting to the Board of
4 Directors documents regarding the legal agreement
5 between the I'On Assembly and the I'On Club pertaining
6 to the usage of the dock?

7 A. I see that, yes.

8 Q. Okay. And, Mr. Clem, as you continued to
9 serve on the Board, did you do anything further or did
10 you have a role in dealing with this legal agreement
11 that was first brought up at your February, 2005
12 meeting?

13 A. Yes. This agreement was first brought to my
14 attention before I served on the Board. It was when I
15 was attending the meetings. We had -- a small group of
16 us had formed a little finance committee, that we
17 wanted to follow the finances of things, and I became
18 aware of this agreement. And I asked to examine it, to
19 see whether or not I agreed with it, so that was the
20 first encounter that I had with that document.

21 Q. Okay. And do -- so you were on this finance
22 committee before you actually got on the board; is that
23 correct?

24 A. It was an informal finance committee.

25 Q. And at that time, your committee was looking

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1 at the agreement, if I understand you correctly?

2 A. Yes, we were.

3 Q. And then after you got on the Board, what did
4 you do with regards to this agreement, if anything?

5 A. Well, I was very disappointed with it. There
6 were a number of things that I didn't think were fair
7 to the community. For one thing, it was signed by the
8 same person in three different roles, as the manager of
9 the I'On Club; as the president of the I'On homeowners
10 association; and as the general manager of the I'On
11 Company. Sort of shaking hands with yourself, as I
12 could describe it. So I was concerned about whether it
13 was even a valid document or not.

14 But above and beyond that, I was concerned about
15 the way the costs were shared on the document. It was
16 a complicated formula, having to deal with percentages,
17 the numbers of people that were in the community; the
18 number of people that were members of I'On Club --
19 there just were a number of things about it that I
20 didn't think were fair to the I'On Assembly, and that's
21 what I reported to the Board.

22 Q. Okay. And that was -- you had those types of
23 concerns before you even got on the Board and while you
24 were serving on the Board in 2005; is that correct?

25 A. Yes.

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1 Q. And let me show you Defendant's Exhibit No.
2 27, and make sure we're talking about the same
3 document. This is Defendant's Exhibit 27, the
4 Recreational Use Easement, is this the document that
5 raised the concerns you were talking about?

6 A. Yes, it is.

7 Q. All right, sir. And at the time that you
8 raised these concerns, was the community already
9 operating under the terms of this agreement?

10 A. Yes.

11 Q. Okay. And that led to your concerns, correct?

12 A. Yes.

13 Q. All right. And at that time, tell us please
14 what you did while serving on the Board, what was the
15 next thing you did with regard to this agreement after
16 you had these concerns about it?

17 A. Well, when I made my presentation to the
18 Board, they had concerns as well. And we discussed
19 those concerns. Vince Graham was on the Board at that
20 time. And the discussion was whether or not it could
21 be rewritten so that it would make more sense and be
22 more fair. And so the Board authorized me to meet with
23 another attorney and see if we could draft up a new
24 document. There was a couple of other people that
25 served with me; one of them was a Board member -- I

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1 think both of them were Board members.

2 Q. So did you go and meet with another attorney
3 back in 2005, to address your concerns with the
4 agreement?

5 A. I'm not sure of the exact time. I believe it
6 was around that time. Yes, I did meet with another
7 attorney.

8 Q. Do you remember the attorney's name?

9 A. His name was Rick Brownyard.

10 Q. And he's a real estate lawyer in Mount
11 Pleasant; is that correct?

12 A. I'm not sure what his practices are.

13 Q. Fair enough. Did you meet with Mr. Brownyard
14 and have some discussions with him about your concerns?

15 A. I did.

16 Q. All right. And did Mr. Graham offer to pay
17 for the -- for the company to pay for half of Mr.
18 Brownyard's fees; do you recall that?

19 A. No, I don't recall that. I don't recall.

20 Q. When you met with Mr. Brownyard, what was the
21 net result of those efforts? What did you finally do?

22 A. He drafted a document that -- when the Board
23 reviewed it, they really felt like it didn't -- wasn't
24 much of an improvement, so they didn't -- they didn't
25 accept the recommendations that he had put forward.

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1 Q. So Mr. Brownyard drafted a new type of
2 agreement, but ultimately the Board didn't like it; is
3 that accurate?

4 A. They just -- they felt it wasn't any better
5 than the one that was -- that was existing, which was
6 unsatisfactory itself.

7 Q. All right. And let me get your attention to
8 Defendant's Exhibit No. 114, if you would, Lee Ann.
9 And in February 23rd of 2005 -- this would have been --
10 I think the next meeting -- does that sound right, Mr.
11 Clem?

12 A. It sounds right, yes.

13 Q. All right. And did you report to the Board at
14 that time, under old business -- on the next page, Lee
15 Ann -- that you had met with Rick Brownyard and had him
16 draft a new agreement like you're discussing now?

17 A. Yes. This is the -- this is what I was
18 discussing.

19 Q. Okay. And then if we could put up Defendant's
20 Exhibit No. 109, which will be August of 2004. So --
21 so this would be a good ways back, I guess, if we are
22 looking at February of '05 now -- we're going back to
23 August of '04. Were you a guest at this meeting as
24 reflected there, in August of 2004?

25 A. Yes, I was.

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1 Q. All right. But at this point, as I
2 understand, you weren't actually on the Board, correct?

3 A. No. The two people besides me, Annie Bonk --
4 it should^d Bonk, B-o-n-k; and Libby Eble were the other
5 two people that were working with me on finances.

6 Q. Yes, sir. All right. And then if we could go
7 to the fourth page there, under old business, do you
8 remember speaking on behalf of your group at this
9 meeting in August of 2004 -- I think it's the very last
10 page, Lee Ann -- under old business, the very first
11 section there. Back in August of 2004, Mr. Clem, take
12 your time to read that -- do you remember at that point
13 reporting to the -- to the Board that you had -- were
14 working with Mr. Brownyard?

15 A. Yes, that's what I just testified to.

16 Q. Okay. And at that time, as reflected there,
17 do you recall Mr. Graham reiterating that he would pay
18 half of the attorneys fees for that?

19 A. I didn't recall it, but I see that that's
20 listed right there.

21 Q. Okay. And, Mr. Clem, during this time, who
22 did you believe owned the -- are you familiar with
23 CV-6?

24 A. Yes, I am.

25 Q. What is CV-6 out at I'On?

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1 A. It's property where the Creek Club is --

2 (Phone ringing in courtroom.)

3 THE COURT: Outside, please. Sorry. Thank you.

4 Out. Outside. Thank you. By order of the Chief

5 Justice, no mobile devices are allowed in the

6 courtroom. I don't have the authority to amend that,

7 but I'll let the attorneys and folks working on the

8 case use it. I won't put you in jail, but I could.

9 All right. I apologize for the interruption.

10 MR. YOUNG: He's going to make sure his is off --

11 THE WITNESS: I want to make sure mine is off.

12 THE COURT: Everybody check -- why don't we all

13 just check out of an abundance of caution.

14 THE WITNESS: CV-6 is the property where the Creek

15 Club is located and the boat docks are located.

16 BY MR. YOUNG:

17 Q. Okay. And, Mr. Clem, while you were on the

18 Board and living in I'On and so forth, do you know who

19 owned CV-6?

20 A. At the time that I was on the Board, the -- it

21 belonged to the I'On Company.

22 Q. All right. Did you ever have any belief that

23 it belonged to the homeowners?

24 A. It was my belief that it wouldn't become the

25 property of the homeowners.

E. CLEM -- DIRECT BY MR. YOUNG

1 Q. And what was that based on, Mr. Clem?

2 A. It was based on upon the Property Report,
3 based upon some other documents that I reviewed since
4 then so I think there were several pieces of paper that
5 indicated that those -- that property wasn't to become
6 part of the homeowners.

7 Q. The Property Report, I want to make sure I
8 understand this correctly, you didn't actually review
9 that before you purchased your lot and closed on it; is
10 that correct?

11 A. I did not.

12 Q. But you were provided with a copy of it?

13 A. Yes.

14 Q. All right. But then later, somebody else
15 brought the Property Report to you; is that correct?

16 A. That's correct.

17 Q. And who was that, please?

18 A. Steve Brock, who was Lee Ann's husband, told
19 me about it.

20 Q. And when was it that Mr. Brock brought you
21 this property report and asked you to look at it?

22 A. He didn't bring it to me. He invited me over
23 to his house to discuss it. And I don't recall, it was
24 sometime in 2008 or 2009, something like that. It was
25 after I was off of the Board.

E. CLEM -- DIRECT BY MR. YOUNG

1 Q. Okay. And he invited you over to his house?

2 A. Yes, he did.

3 Q. And he talked about the contents of the report
4 and discussed it with you at that time?

5 A. Yes, he did.

6 Q. Before that, had you looked at the report in
7 any detail?

8 A. Before that?

9 Q. Yes, sir.

10 A. Not I recall.

11 Q. Okay. Do you recall back in April of 2007,
12 Mr. Graham or I'On Company coming to some of the Board
13 meetings and offering to sell civic lot 6 to the
14 Assembly? Were there some discussions about that while
15 you were on the Board?

16 A. In 2007, there were discussions about that
17 related to their intention to develop phase XI.

18 Q. And at that time, were you still on the Board
19 or were off the Board?

20 A. I was on the Board until the end of 2007.

21 Q. All right. And you recall some discussions at
22 these Board meetings about the company possibly selling
23 civic lot 6 to the Assembly; is that correct?

24 A. The discussion was about selling the Creek
25 Club to -- civic lot 6.

E. CLEM -- DIRECT BY MR. YOUNG

1 Q. It was just limited to the Creek Club; is that
2 right?

3 A. That's what I recall.

4 Q. Okay. Were there any concerns while you were
5 on the Board about -- would there ever have been any
6 concerns about the Assembly actually owning civic lot
7 6, or the Creek Club, or the docks?

8 A. There were -- as I recall, three different
9 presentations of phase XI, that had associated with it
10 the potential purchase of the Creek Club by the
11 Assembly. After one of those presentations, we thought
12 it was very important for the community to have some
13 input on that. And so we called a meeting of the
14 Assembly, about 200 people attended. And as you might
15 imagine, there were opinions all over the map, some in
16 favor, some had concerns, so forth. So there was a
17 variety of opinions about that.

18 Q. All right. What were some of the -- were
19 there any concerns about the costs that were raised by
20 the Assembly or brought to the Assembly's attention?

21 A. I don't recall the cost was a big
22 consideration. There was concerns about liability;
23 concerns about the use of it; things like that. There
24 could have been some concerns about costs, but I don't
25 recall that that was a big concern.

E. CLEM -- DIRECT BY MR. YOUNG

1 Q. And, Mr. Clem, out at I'On, there are a number
2 of docks, correct?

3 A. Yes, sir, a total of five.

4 Q. All right. And those docks, what do -- how
5 are they commonly referred to?

6 A. Well, there are three smaller docks that are
7 called the crabbing docks. Then there are two docks
8 that are closely associated with one large dock, and
9 then one small dock, and those are typically called
10 the -- the boating facility, is what they call them.

11 Q. Were all the -- the crabbing docks you
12 mentioned, were those the docks -- and I'll show you a
13 picture if that helps -- over on the tributary to
14 Hobcaw Creek?

15 A. Yes, they are.

16 Q. The ones that -- the two that are shown on
17 this photograph?

18 A. Right.

19 Q. Okay. And they've got -- this dock number 2
20 we've been calling it in the trial, that's one of the
21 ones you're referring to as the crabbing dock?

22 A. Yes.

23 Q. And then this other one, dock number 3, we've
24 been calling it in trial?

25 A. Yes.

E. CLEM -- DIRECT BY MR. YOUNG

1 Q. All right. And isn't there -- in addition,
2 isn't there a dock -- I don't think you can see it on
3 here, further around, that doesn't even have a float?

4 A. Yes.

5 Q. A pier head only?

6 A. Yes.

7 Q. And all of those docks, were those available
8 to the community while you were on the Board?

9 A. Yes.

10 Q. Was there ever any problem with the use and
11 access of those docks while you were on the Board, back
12 in '05?

13 A. I don't recall that anything was brought to
14 our attention, about problems with those docks. There
15 was of concern about the congestion and so forth of the
16 boating facility docks.

17 Q. The -- the congestion on the docks up on
18 Hobcaw Creek?

19 A. The -- the -- not congestion on the creek, the
20 congestion launching boats, trailers being left in the
21 parking lot so people couldn't park in there. Just
22 rowdiness, parties, things like that.

23 Q. Okay. And while you were on the Board, the
24 homeowners association -- or the Assembly actually,
25 owned outright the two docks over on -- we've been

E. CLEM -- DIRECT BY MR. YOUNG

1 calling dock 2 and dock 3 during the trial, right?

2 A. Would you repeat that question?

3 Q. Yes, sir. While you were on the Board, back
4 in 2005 and 2007 --

5 A. Yes.

6 Q. -- did you recall the Assembly actually owned
7 two of the docks, the docks over on the tributary?

8 A. I was never sure about that, because we -- we
9 raised questions to Chad Besenfelder, who was the
10 general manager of the I'On Company at that time, about
11 whether those docks had ever been turned over to us.
12 And we had put in place -- when I was on the Board, we
13 put in place procedure to inspect the facilities when
14 the I'On Company told us they were ready to turn it
15 over to us.

16 And that consisted of a representative on one of
17 the committees of the Board, the infrastructure
18 committee. Sometimes a member of the Board and a
19 member of the I'On Company would go through and do an
20 inspection, much like you might have an inspection done
21 on a house before you would buy it.

22 And so we were told that when that inspection
23 was done on the marsh path, that the acceptance of the
24 marsh path conveyed those crab docks to us because they
25 were attached to it. But the committee that did the

E. CLEM -- DIRECT BY MR. YOUNG

1 inspection, never inspected those crab docks, so there
2 was a little bit of a lack of understanding between the
3 Board and the I'On Company as to whether those crab
4 docks were officially turned over to us.

5 Q. Okay. And if you could put up Exhibit No.
6 140, Lee Ann. Do you recall -- and during these
7 discussions, whether or not the Marshwalk had actually
8 been deeded over back in 2000 to the -- five years
9 before you got on the Board?

10 A. I don't recall. There was -- there was a
11 whole series of turnovers that took place over time. I
12 can't remember what was conveyed at what particular
13 point in time. There are parcels that still haven't
14 been turned over to us, that is still belonged to the
15 I'On Company.

16 Q. And, Mr. Clem, let me put up Defendant's
17 Exhibit No. 124, the April 2007 Board meeting -- and if
18 we could go down, Lee Ann -- at this point, it looks
19 like you actually called this meeting to order under
20 AMCS; is that right?

21 A. That's right.

22 Q. Okay. And then down a little bit further,
23 when we were talking -- it must have been about the
24 sale of the Creek Club -- if you could blow up the
25 bottom half of that bottom paragraph, that starts with

E. CLEM -- DIRECT BY MR. YOUNG

1 "the sale of the Creek Club" please, ma'am -- that's
2 fine Lee Ann. At this time, Mr. Clem, isn't it true
3 that the sale of the Creek Club that was being proposed
4 would have included the building, the boat ramp, the
5 dock, the parking lot, and the overflow parking lot,
6 not just the Creek Club?

7 A. That's what it says, yes.

8 Q. Okay. You just don't recall it being
9 presented that way?

10 A. I don't. And it's -- it's -- it doesn't seem
11 right, because the boat docks and the boating facility
12 were supposed to be given to us without, you know,
13 being connected to the Creek Club.

14 Q. And, Mr. Clem, my final question for you is
15 before coming to court today, did you have any
16 discussions with the Plaintiff's counsel in preparing
17 for your testimony?

18 A. Yes, I did.

19 Q. And when were those discussions?

20 A. I believe they were a weekend, Saturday or
21 Sunday, I can't recall.

22 Q. A few days ago?

23 A. Yes.

24 Q. After the trial started?

25 A. No.

E. CLEM -- CROSS BY MR. EVANS

1 Q. Before the trial started?

2 A. Before the trial started.

3 MR. YOUNG: Thank you.

4 THE COURT: Thank you. All right. Cross
5 examination.

6 **CROSS EXAMINATION BY MR. EVANS:**

7 Q. Good morning, Mr. Clem.

8 A. Good morning.

9 Q. You believed the developer obligated
10 themselves to convey the Creekside Park and the
11 community dock to the Assembly, with no charge, with no
12 encumbrances, correct?

13 A. That's my understanding, yes, it is.

14 Q. And you believe Creekside Park to be located
15 at CV-6, correct?

16 A. Yes, I do.

17 Q. Do you believe the community dock is the dock
18 at CV-6, correct?

19 A. That's correct.

20 Q. And -- the one that's got the pavilion on it,
21 correct?

22 A. That's right.

23 Q. The developer has never offered to convey the
24 property for free and with no encumbrances while you
25 were sitting on the Board, correct?

E. CLEM -- CROSS BY MR. EVANS

1 A. Never.

2 Q. There were offers to sell it to you, correct?

3 A. That's correct.

4 Q. And those offers had pretty stiff conditions
5 on them, correct?

6 A. Yeah. They required us, as a homeowners
7 association, to essentially take the lead in getting
8 approval of the phase XI with the town.

9 Q. And let's -- let's discuss that a little bit
10 more. You had to not only support an amendment to add
11 somewhere around 40 more lots to the neighborhood, you
12 had to be a co-applicant on that application, correct?

13 A. That's correct.

14 Q. You had to stand up at town council meetings
15 and, say, please, we want this, correct?

16 A. That's right.

17 Q. And the Board would be given some money in
18 exchange for taking that lead, correct?

19 A. Along with three other entities were getting
20 money, too.

21 Q. And those other entities were going to get the
22 same amount of money you were, but they didn't have to
23 do anything, correct?

24 A. That's correct.

25 Q. And not only did you have to do all this to --

E. CLEM -- CROSS BY MR. EVANS

1 if you got money, you then were going to have to turn
2 around and submit a plan to the developer as to how you
3 were going to spend the money that you got, correct?

4 A. That's correct.

5 Q. After one of those offers that was tied to the
6 additional lots, you submitted -- or you requested
7 input from the neighborhood, correct?

8 A. Yeah. I think in May, we had a public
9 meeting. As I say, about 200 people came to that
10 meeting.

11 Q. And most of those concerned citizens were --
12 were troubled by the fact that the -- the purchase of
13 what was going to be their own property was -- was tied
14 to an additional 40 lots or so, when the neighborhood
15 already had problems with density from the very
16 beginning, correct?

17 MR. YOUNG: Objection. It calls for speculation.

18 THE COURT: Sustained. Rephrase your question,
19 please.

20 BY MR. EVANS:

21 Q. Are you aware that from the very beginning of
22 the neighborhood, there were concerns about density?

23 A. That was quite a concern because all of the
24 traffic from that would have to come out through the
25 one main entrance right there.

E. CLEM -- CROSS BY MR. EVANS

1 Q. Did homeowners that showed up for this
2 proposed amendment to the neighborhood, have concern
3 about the addition of even more lots to the
4 neighborhood?

5 A. That was one of the concerns that we heard.

6 Q. In 2005 to 2007, when you were sitting on the
7 Board, and you knew that the property had not yet been
8 conveyed to the homeowners association, you weren't
9 concerned because the developer was still in the
10 neighborhood and would still be in the neighborhood for
11 years developing property, correct?

12 A. That's correct.

13 Q. You weren't concerned about the -- the -- who
14 held the title to the property until the developer
15 turned around and gave it to somebody else, correct?

16 A. There was --

17 MR. YOUNG: Objection, leading.

18 THE COURT: Sustained. Rephrase your question,
19 please.

20 BY MR. EVANS:

21 Q. Did you have any concerns about who held the
22 title to the Creekside Park and community dock --

23 A. Not at that point in time, I didn't, because
24 we expected it was going to be turned over to us. I
25 was also the treasurer at that time, and I was

E. CLEM -- REDIRECT BY MR. YOUNG

1 concerned about the cost -- we were paying a share of
2 the costs. But I think when they were turned over to
3 us, we would be responsible for all of the costs, so it
4 really wasn't an incentive to get it any sooner than we
5 got it.

6 Q. Did the easement -- the existence of that
7 recreational easement that you looked at on the screen
8 with Mr. Young, give you any concern about a future
9 conveyance to the Assembly of the property?

10 A. No.

11 Q. Why not?

12 A. Well, because the developer was still there.
13 And I figured over time, he would get around to turning
14 it over to us. So as long as he was around there,
15 there wasn't -- I didn't see a concern over the timing
16 of it.

17 MR. EVANS: Thank you, Mr. Clem.

18 THE COURT: Okay. Redirect.

19 **REDIRECT EXAMINATION BY MR. YOUNG:**

20 Q. Mr. Clem, did you ever refer to the docks on
21 the tributary as community docks?

22 A. Did I ever refer to them?

23 Q. Yes, sir.

24 A. Not that I remember, no.

25 Q. Okay. And do you recall giving your

E. CLEM -- REDIRECT BY MR. YOUNG

1 deposition in this case back in December of 2012?

2 A. I do.

3 Q. All right. And at the time you gave your
4 deposition, had you met with the plaintiff's lawyers
5 before that?

6 A. No.

7 Q. Okay. But you've met with the plaintiff's
8 lawyers since you gave your deposition and between your
9 testimony today; is that right?

10 A. Yes.

11 Q. Did you meet them at their offices or just on
12 the phone?

13 A. I met at their offices.

14 Q. So you went to their office. And did y'all
15 discuss the testimony that you were going to give here
16 in court today?

17 A. I was -- I was seeking some help on preparing
18 myself for it, so we talked about what kind of
19 questions might be asked and so forth.

20 Q. Okay. And did you tell them what your answers
21 would be?

22 A. Some I did, yes. Some I didn't have answers
23 for.

24 Q. Okay. Did they suggest to you how you might
25 should answer some of these questions?

E. CLEM -- REDIRECT BY MR. YOUNG

1 A. Not that I recall.

2 Q. Did they assist you in preparing your
3 testimony?

4 A. I was counselling with them, so to the extent
5 that they were helping me, I guess it could be as
6 assisting.

7 Q. Did they -- did they tell you that you ought
8 to refer to these side docks as crabbing docks --

9 A. No.

10 Q. -- rather than community docks?

11 A. No, they did not.

12 Q. Okay. When you gave your deposition back in
13 December of 2012 --

14 MR. YOUNG: With the court's permission, may I
15 open this?

16 THE COURT: Yes.

17 BY MR. YOUNG:

18 Q. Let me direct your attention, Mr. Clem -- you
19 and I never met before today; is that correct?

20 A. No, we have not.

21 Q. We met in the hallway just as a courtesy. But
22 my partner, Mr. Duffy, took your deposition back in
23 December of 2012, right?

24 A. Yes, he did.

25 Q. And at that time, you were under oath, right?

E. CLEM -- REDIRECT BY MR. YOUNG

1 I'm handing you a copy of your -- transcript from your
2 deposition. Where was the deposition taken, Mr. Clem?

3 A. This was taken at the offices of Duffy &
4 Young.

5 Q. All right. And if you would turn with me,
6 please, sir, to page 55 of your deposition -- and, Lee
7 Ann, would you put up Defendant's Exhibit 128. Let me
8 know when you are at page 55.

9 A. I'm there.

10 Q. Okay. Mr. Clem, do you remember at the
11 deposition talking about the meeting minutes from
12 September 26, 2007, which we've put on the board here
13 as Exhibit No. 128; I believe it was actually Exhibit
14 11 -- 111 to your deposition.

15 A. Would you rephrase that -- ask that question
16 again.

17 Q. Yes, sir. At your deposition, do you remember
18 some questions being asked of you?

19 A. I do, yes.

20 Q. About this particular set of meeting minutes,
21 September 26, 2007?

22 A. Yes, I do.

23 Q. All right. And if you would turn to the third
24 page of that Exhibit -- 128, please Lee Ann -- there's
25 a last paragraph in there that begins with "Chad

E. CLEM -- REDIRECT BY MR. YOUNG

1 Besenfelder advised that he would like to turn over the
2 community docks" -- do you see that, "property
3 turnover"?

4 A. Right, I do.

5 Q. Are you with me, Mr. Clem, on those meeting
6 minutes?

7 A. I am, yes.

8 Q. All right. And do you recall Mr. Besenfelder
9 advising in 2007 that he'd like to turn over the
10 community docks? Okay?

11 A. That's what the minutes reflect, yes.

12 Q. All right. And just like you said a minute
13 ago, you had some concerns with the condition, correct?

14 A. I did, because there had been a small
15 committee of the homeowners that had -- were meeting to
16 talk about the docks, and some -- what -- at least one
17 person, in particular, expressed some concerns to the
18 Board that the docks weren't being maintained properly.

19 Q. All right. And as you testified a minute ago,
20 there's five docks in I'On, right?

21 A. Right.

22 Q. Two up on Hobcaw Creek and then the three on
23 the side, correct?

24 A. Yes.

25 Q. All right. And did you refer to the three on

E. CLEM -- REDIRECT BY MR. YOUNG

1 the side as community docks, back in your deposition in
2 December of 2012, before you met with the plaintiff's
3 lawyers?

4 A. (No response.)

5 Q. Do you remember that without looking at your
6 transcript; do you recall?

7 A. I -- I have read these minutes, and I
8 understand that's what is recorded that took place.
9 I'm -- I'm not sure I understand what your question is,
10 sir.

11 Q. Yes, sir. Back in 2012, when you gave your
12 deposition, did you refer to the three docks on the
13 side as community docks at I'On?

14 A. Chad is the one who referred to them as
15 community dock.

16 Q. Let me read the question to you on page 56,
17 I'm going to read the question.

18 Question: "Do you remember having looked at
19 these meetings minutes, you telling Chad Besenfelder,
20 who was there on behalf of the I'On Company, that the
21 docks at the Creek Club weren't ready to be handed over
22 because they weren't in any shape for it?"

23 Answer: "I believe this reference, when it says
24 community docks, we have five docks there at the -- in
25 our community. Three of the docks are smaller docks

1 and they are sometimes referred to as fishing docks or
2 crabbing docks. Then there are two docks that are
3 associated with the boating facility. When I see
4 community docks, I'm thinking the three docks. And I
5 think that Chad was saying they were ready to turn over
6 those to us." Did I read that correctly, Mr. Clem?

7 A. Yes, you did.

8 Q. Thank you.

9 MR. YOUNG: I don't have any further questions.

10 THE COURT: Okay. Anything further?

11 MR. EVANS: Briefly, Your Honor.

12 BY MR. EVANS:

13 Q. Mr. Clem, with regard to the meeting minutes
14 that you just looked at, which were September 26, 2007,
15 meeting minutes, after Chad Besenfelder said he would
16 like to turn over the community docks, didn't he say
17 that he would have to look into needed repairs and
18 consult the use agreement, which calls for
19 reimbursement from the Assembly's behalf?

20 A. Yes, he did.

21 Q. Which agreement is that?

22 A. The -- the Recreational Agreement.

23 Q. Which docks does the Recreational Agreement
24 involve?

25 A. The boating facility docks.

D. THOMPSON -- DIRECT BY MR. DUFFY

1 Q. Not the crabbing docks up the creek?

2 A. Not crabbing docks, no, sir.

3 MR. EVANS: Thank you. Nothing further.

4 THE COURT: Okay. Thank you, sir. You may step
5 down and be excused. All right. Call your next
6 witness, please.

7 MR. DUFFY: Thank you, Your Honor. The defendants
8 call David Thompson.

9 THE COURT: Right up here, sir, if you would.
10 We'll swear you in. Sorry kind of tight through there.

11 DAVID THOMPSON, after having been
12 duly sworn, testified as follows:

13 THE CLERK: Please have a seat. State your full
14 name for the record, spelling your last.

15 THE WITNESS: David Thompson, T-h-o-m-p-s-o-n.

16 **DIRECT EXAMINATION BY MR. DUFFY:**

17 Q. Good morning, Mr. Thompson.

18 A. Good morning.

19 Q. Could you tell the jury, please, a little bit
20 about yourself, including where you live and when you
21 purchased your house?

22 A. I currently live at [REDACTED]
23 [REDACTED]. It's our second home. We
24 previously lived at [REDACTED].

25 Q. Okay. And when did you purchase property in

D. THOMPSON -- DIRECT BY MR. DUFFY

1 I'On?

2 A. I believe it was 2002 --

3 Q. Okay.

4 A. -- was our first property.

5 Q. And you then purchased another property in
6 I'On; is that right?

7 A. In 2008.

8 Q. Okay. And when you moved to I'On, did you
9 join the I'On Club?

10 A. Yes.

11 Q. And tell me why you decided to join the I'On
12 Club?

13 A. It's a wonderful facility. I'm -- I'm a
14 tennis player before the foot surgery, and I hope to be
15 again. And the pool -- and it just -- it was a way of
16 meeting neighbors, so I thought it was a great
17 facility.

18 Q. Are you a boater, Mr. Thompson?

19 A. I am. I have been a member of Freedom Boat
20 Club for, I guess, going on -- this is our sixth year,
21 which is located at Patriots Point.

22 Q. Okay. Did you recall ever being promised,
23 when you were buying property, that the boating
24 facilities were going to be owned by the homeowners
25 association?

D. THOMPSON -- DIRECT BY MR. DUFFY

1 A. No. I thought -- similar to the -- the I'On
2 Club, that it was, you know, part of that. But it was
3 a membership, and it was not necessarily -- didn't
4 belong to us. It was something that we could belong to
5 -- you know, be a member of.

6 Q. And how about the Creek Club, did you think
7 that was going to be deeded over free of charge to the
8 homeowners association?

9 A. I wasn't under that opinion, no. I -- I was
10 never given any reason to believe that.

11 Q. And as far as you are concerned -- or as far
12 as you know, as -- the I'On -- I'm sorry -- has the
13 Creek Club always been a private rental venue?

14 A. It has. And -- yes, it has. Our daughter was
15 married there in November of 2011.

16 Q. Great. Congratulations. Who was your
17 Realtor -- or who were the Realtors involved in your
18 transaction at I'On?

19 A. It was I'On Realty. It was -- Laurie
20 Thornhill was our realtor.

21 Q. And did Ms. Thornhill give you a 1998 Property
22 Report when you purchased?

23 A. She did not.

24 Q. Have you been familiar with -- keeping
25 yourself familiar with the litigation that has gone on

D. THOMPSON -- DIRECT BY MR. DUFFY

1 in this case?

2 A. It's pretty hard not to.

3 Q. And you've attended Board meetings addressing
4 it; is that right?

5 A. I attended Board meetings and meetings as I
6 have been available with travel.

7 Q. Do you support the claims that are being
8 alleged against the I'On Company and others?

9 A. No, I don't. When the Creek Club was sold,
10 when they built the I'On Inn, and I found out that the
11 Creek Club was part of it, I was actually -- I thought
12 that was a good thing, because it was our neighbors
13 that were doing it. It was still owned by I'On
14 residents.

15 Q. So you're referring to Mike Russo and his
16 company, 148 Civitas?

17 A. Yes, sir.

18 Q. Mr. Thompson, do you believe you were treated
19 fairly in your purchase of property at I'On?

20 A. Yes, sir.

21 Q. Did you get the amenities and expectations
22 that you had, were those delivered to you in your
23 purchase price?

24 A. Yes.

25 Q. And finally, Mr. Thompson, I didn't subpoena

D. THOMPSON -- CROSS BY MR. LUCEY

1 you to make you come down with crutches, did I? You're
2 here voluntarily; is that right?

3 A. Yes, I am.

4 MR. DUFFY: Thank you, sir.

5 THE COURT: Okay. Cross examination.

6 **CROSS EXAMINATION BY MR. LUCEY:**

7 Q. Sir, is your son named David Thompson?

8 A. I'm sorry.

9 Q. Is your son named David Thompson?

10 A. No, I have one daughter.

11 Q. You are retired from Cincinnati?

12 A. I'm not retired. I am from Cincinnati.

13 Q. Okay. And you used to work for a while at
14 Carolina One Realty; is that correct?

15 A. I received my real estate license last year at
16 Carolina One. I'm a manufacture representative. And
17 because of foot surgery, I decided rather than doing
18 nothing, I would do something that I've always wanted
19 to do.

20 Q. So you do sell real estate for a living?

21 A. Currently it's suspended as a result of foot
22 surgery.

23 Q. Your license is not suspended; your activities
24 are?

25 A. I have suspended my license currently.

D. THOMPSON -- CROSS BY MR. LUCEY

1 Q. You have suspended it?

2 A. Yes, sir. It's on -- yes.

3 Q. And prior to hurting your foot, you were an
4 avid tennis player at the I'On Club, correct?

5 A. Never very good, but certainly enjoyed it.

6 Q. The I'On Club that's managed by Tom Graham?

7 A. Correct, yes.

8 Q. And you are, in fact, from time to time --
9 before you hurt your foot -- Tom Graham's tennis
10 partner, correct?

11 A. Yes.

12 Q. You didn't happen to bring your closing file
13 with you or the materials you were given when you first
14 purchased at I'On, did you?

15 A. I did not.

16 Q. And, in fact, you didn't purchase your first
17 house from the I'On Company, did you?

18 A. I -- it was from -- I'm not exactly sure. It
19 was -- Steve Kendrick was building the house.
20 Structures Building Company is who we purchased it
21 from, I believe.

22 Q. That's a builder?

23 A. Yes. Kendrick. Steve Kendrick.

24 Q. So the builder would have been the one who
25 bought the property from the I'On Club, correct.

D. THOMPSON -- CROSS BY MR. LUCEY

1 A. I guess that's true.

2 Q. The builder would have been the one who got
3 the representation and the documentation and marketing
4 materials from the I'On Club, correct?

5 A. Yeah. I think he would have certainly passed
6 along any material benefits that would have gone along
7 with it, though, when we purchased the house.

8 Q. Did you bring those -- did you bring any of
9 your materials with you from your purchase?

10 A. I didn't. I wasn't asked to.

11 Q. Thank you, sir.

12 THE COURT: Any redirect?

13 MR. DUFFY: Nothing further, Your Honor. Thank
14 you.

15 THE COURT: All right, sir. You may step down and
16 be excused.

17 MR. DUFFY: Your Honor, I've been advised some
18 folks might need a break.

19 THE COURT: Okay. All right. Thank you. I
20 appreciate that. All right. Thank you. Let's let Mr.
21 Thompson get down and then take about a 10 minute
22 break. I apologize for not keeping track. All right.
23 Ladies and gentlemen, please return to your jury room.
24 Please do not discuss the case yet and we'll get you
25 back out in about 10 minutes. Thank you.

D. THOMPSON -- CROSS BY MR. LUCEY

1 (WHEREUPON, the jury leaves the courtroom at
2 11:47 a.m.)

3 THE COURT: All right. We'll be at ease about 10
4 minutes. Thank you.

5 (WHEREUPON, a brief recess was taken.)

6 THE COURT: Okay. Do we have everybody back that
7 we need? If the jurors are ready, we can bring them
8 in.

9 (WHEREUPON, the jury enters the courtroom at
10 approximately 11:57 p.m.)

11 THE COURT: Thank you, ladies and gentlemen. We
12 are ready to continue. Whenever you all are ready.

13 MR. DUFFY: Thank you, Your Honor. The defense
14 calls Vince Graham.

15 THE COURT: All right, sir. Mr. Graham, come on
16 up and we'll swear you in. And if we run over into
17 lunchtime, and the food comes, y'all just let me know
18 when the juror's food gets here and we'll take a break
19 at the appropriate time.

20 VINCE GRAHAM, after having been
21 duly sworn, testified as follows:

22 THE CLERK: Thank you, sir. Please have a seat
23 and state your full name for the record, spelling your
24 last.

25 THE WITNESS: My name is Vincent Graham,

V. GRAHAM -- DIRECT BY MR. DUFFY

1 G-r-a-h-a-m.

2 **DIRECT EXAMINATION BY MR. DUFFY:**

3 Q. Hello, Vince.

4 A. Good morning.

5 Q. Lea Ann, please put up Defendant's Exhibit 22
6 please, and let's go to page 21, the table. Please
7 highlight phase II portion and call that out. Vince, I
8 just want to get you straight to the point. At the
9 time of November -- November, 1998, did the I'On
10 Company intend to build the pavilion dock at the Creek
11 Club?

12 A. Yes.

13 Q. In November of 1998, did the I'On Company
14 anticipate deeding over the pavilion dock and the Creek
15 Club to the Assembly?

16 A. That's what we had planned to do if we could
17 build it, yes.

18 Q. In 1998, did the I'On Company plan to build
19 several other docks?

20 A. Yes.

21 Q. In 1998, did the I'On Company plan to deed
22 over those many other docks to the homeowners
23 association?

24 A. Yes.

25 Q. Let's look at Defendant's Exhibit 4, please.

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1 You are familiar with this, aren't you, Vince?

2 A. I am.

3 Q. Does this reflect in 1997, at least -- late
4 '97, what plans the I'On Company had for community
5 docks?

6 A. It does. This was part of the dock master
7 plan.

8 Q. Did the I'On Company build all of the docks
9 that it planned to build here?

10 A. No.

11 Q. Which ones did it not plan to build -- or, I'm
12 sorry, which ones they did not build that was planned
13 to build?

14 A. Well, we -- we built two, three and four
15 pretty much as shown right there, the ones in the
16 middle. We didn't build five or six. And we didn't
17 build one, as shown. We built actually two docks there
18 that we talked about, and then a different
19 configuration.

20 Q. Okay. So -- and number one, you built a dock
21 in that location, but not the dock that's referenced
22 there; is that right?

23 A. That's correct. Two docks in that location,
24 but not the one shown.

25 Q. Okay. Lee Ann, let's look at Plaintiff's

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1 Exhibit 3, please. Page eight, Vince. Are you
2 familiar with the I'On Impact Assessment?

3 A. Yes, I wrote it.

4 Q. Do you see there's a reference to seven
5 community docks -- highlight the middle paragraph,
6 please.

7 A. Yes, I see.

8 Q. At the time of the Impact Assessment, was the
9 I'On Company planning to build seven community docks?

10 A. Well, that's what was envisioned. I mean,
11 it's part of -- when you write this Impact Statement,
12 that's part of the rezoning application that we sought,
13 you have to provide all the potential impacts of the
14 project. So you have to pretty much list all the
15 potential impacts you can think of.

16 And we had proposed as many as seven community
17 docks in lieu of individual -- owned by individual --
18 private, individuals. So there could have been -- it
19 kind of is a sidepoint -- but there could have been,
20 say 30 or more individual docks. But in lieu of that,
21 we wanted to do these community docks that was kind of
22 a maximum --

23 Q. Okay. And you see there, it says they are to
24 provide access; is that right?

25 A. Yes. That's correct.

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1 Q. You are not saying here that you're deeding
2 over seven community docks to the neighborhood, are
3 you?

4 A. No.

5 Q. Now, let's talk a little bit -- if you are
6 talking about an Impact Assessment, and you wrote it.
7 Earlier on in the trial, we heard some testimony about
8 the Graham Development?

9 A. I think the Graham Company.

10 Q. Graham Company.

11 A. You heard about Graham Development, too, but
12 that's my dad's company.

13 Q. I had that on my mind. As far as the Impact
14 Assessment was concerned, it was submitted by the
15 Graham Company; is that right?

16 A. That's correct.

17 Q. And tell me what's the Graham Company?

18 A. Well, the Graham Company was kind of a
19 placeholder. It was my dad's and I, you know,
20 partnership that we had at the time. At the time this
21 was written, we didn't own the property, nor did we
22 even know if we would be able to get I'On approved.
23 Because, again, this was written as part of a rezoning
24 application which we weren't going to be in a position
25 to purchase the property, unless and until we got the

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1 property rezoned.

2 So that was just a placeholder. And then after
3 we got the property rezoned and purchased it -- before
4 we purchased it, we formed -- legally form the I'On
5 Company, LLC.

6 Q. So this is a very preliminary step; is that
7 fair to say?

8 A. Yeah. At some -- it's very preliminary. And,
9 you know, just to make further the point, it's -- it's
10 easy to see, in hindsight, what -- to say in hindsight
11 what might have been done when it's all done, but at
12 this point, we're just -- it was just speculation. I
13 mean, we're just hoping to be able to do it, and this
14 is what we envisioned. This was kind of the grand
15 dream.

16 Q. And you were indicating it for the purpose --
17 you mentioned what the purpose was of providing a
18 town -- the Impact Statement, and they -- and they
19 provided back an assessment?

20 A. That's correct. You have to list your impacts
21 on traffic, on surrounding roads, on the school system,
22 on the water and sewer. There's a number of different
23 impacts that are covered. This is actually, page
24 six -- I think the total document was probably over 50
25 pages. And this was something that you -- that every

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1 developer submits as part of a rezoning application to
2 the town. This is what the town requires.

3 Q. Now, you didn't build the seven docks that are
4 shown in the Impact Assessment, did you?

5 A. No, we did not.

6 Q. Has anyone sued you about not building seven
7 docks shown on the Impact Assessment?

8 A. No.

9 Q. Has anyone sued you about not building the
10 docks we saw on the dock master plan?

11 A. No --

12 Q. The ones --

13 A. I'm sorry?

14 Q. Remember the five and six docks?

15 A. Yeah. No, they haven't.

16 Q. And how about for a different configuration of
17 the Creek Club dock, you have been challenged for the
18 way you built the Creek Club?

19 A. No, I have never been challenged.

20 Q. If you were planning these seven docks or six
21 docks, envisioned all of these things, anticipated
22 turning those over to the homeowners association, why
23 didn't you put that in a 1998 Property Report as a
24 description of the community dock?

25 A. Well, the '98 Property Report, we have to be

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1 very conservative in what we promise. And so -- we had
2 not even, at that point, I don't think we had even
3 applied for a final dock permit. We didn't own the
4 property at that point. We owned the property that is
5 comprised of phase I -- and actually phase -- no, just
6 phase I at that point, but we -- we felt confident that
7 we would be able to get multiple community docks, but
8 we could only -- I felt confident enough that we could
9 say "community dock", but not "community docks".
10 Because -- I mean, there was a lot of -- when you
11 begin, when -- you have to go through, as has been
12 highlighted here, you have to go through a number of
13 governmental agencies to get final approval.

14 Q. Did you plan to provide to the homeowners more
15 than what you represented in the 1998 Property Report?

16 A. We planned to. That was our intent, but we
17 didn't want to -- again, we wanted to be conservative
18 in what we described and promised.

19 Q. Now, as far as the community docks, when --
20 you know, there has been talk about whether this should
21 be called a community dock or, you know, is this a
22 crabbing dock. Community dock -- do you understand the
23 community dock is actually -- there are legal
24 definitions of community dock?

25 A. Well, I know there's definitions that the

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1 State has, and that DHEC has, and that can be found on,
2 for example, the University of South Carolina Law
3 School site, about what a community dock is; how it's
4 defined.

5 Q. Well, so DHEC and OCRM are permitting
6 agencies; is that right?

7 A. That's right. I'm sorry, I'll use these
8 acronyms -- but it's the Department of Health and
9 Environmental Control, and the Office of Coastal
10 Resource Management, which is a branch of the
11 Department of Health and Environmental Control.

12 Q. And do you understand it has to be -- the dock
13 has to be a certain size, allow a certain amount of
14 room in a creek for a boat, and that sort of thing, to
15 be called a community dock?

16 MR. LUCEY: Objection, leading.

17 THE COURT: Sustained.

18 BY MR. DUFFY:

19 Q. Do you have an understanding of what the
20 characteristics of the community docks are according to
21 DHEC?

22 A. Yes, I have an idea.

23 Q. Tell me what you understand that to be.

24 A. Well, from going from memory, you have to have
25 a -- I think it's 20 feet minimum between marsh grass

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1 or so, and you have to be able to dock a 20 foot boat
2 at the dock. That's kind of a minimum. There's other
3 criteria, but we can Google it if you want.

4 Q. No, thank you. I think that's sufficient.
5 Well, tell me, do you understand whether or not DHEC --
6 OCRM considers dock two and three to be community
7 docks?

8 A. Yes, they do. They wouldn't have allowed them
9 to be built as they were otherwise.

10 Q. Thank you. Let's look at the Impact
11 Assessment one more time, on page eight while we're
12 there. Could you blow that up please. Okay. Do you
13 see there that -- I'm sorry, Lee Ann -- I want to look
14 at the -- just above that is the -- yeah, the
15 photograph in the caption. Thank you. Do you see this
16 picture in the Impact Assessment; do you see that?

17 A. Yes, sir.

18 Q. Okay. And were you involved with preparing
19 the Impact Assessment?

20 A. Yes.

21 Q. And do you know what this picture is?

22 A. Well, it's described below, it's a park on
23 Middle Street in the Old Village of Mount Pleasant.

24 Q. Okay. And where on Middle Street is it? Can
25 you give us an idea?

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1 A. It's at the end of Middle Street, kind of at
2 the Ft. Sumter end of the Old Village. I guess that
3 would be the south end of Middle Street.

4 Q. Okay. The real point is, is this a photograph
5 of Alhambra Hall that's out there?

6 A. No. That's further to the north.

7 Q. Alhambra Hall is on the water; is that right?

8 A. That's correct.

9 Q. Okay. Let's look at Defendant's 32, please,
10 on the second page -- on the next to the last
11 paragraph, please highlight that. Now, are you
12 familiar with Ms. Adkins' letter to Mr. Bouch, and then
13 the same similar language has been passed along as a
14 suggestion of what the Creekside Park is?

15 A. Yes.

16 Q. Okay. And do you see in front of you -- I'm
17 sorry -- it must be the one above it. What I'll do,
18 then, is go to -- I'll have to look back at that one
19 and find it, but the letter -- let's look at --

20 A. Are you talking about the fourth paragraph on
21 that page?

22 Q. Do you have it there? I don't have it in
23 front of me, I can't see it. But the fourth
24 paragraph -- tell me what the fourth paragraph says?

25 A. On page six of the Assessment, there is a

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1 photograph of an established park featuring significant
2 open areas surrounded by large oaks, noted that that
3 has quote, "A park on Middle Street and the Old
4 Village" close quote. As you can see, there are
5 scattered picnic tables on this lawn and open area.
6 The photograph looks like the lawn and grounds of the
7 Creek Club, which happens to be located along the
8 waters of Hobcaw Creek, a significant waterfront area,
9 the road ending.

10 And the previous -- page five of the assessment
11 describes the quote "extensive park system planned
12 along the highlands above the marshes and waters of
13 Hobcaw Creek, together with the other best management
14 practices, will serve as a dual purpose of providing
15 storm water control and serving as an amenity for
16 residents".

17 There's other references, gives reasons to
18 believe that the current parcel of land at civic site
19 six, which is the location of the Creek Club, is
20 actually being quote "Creekside Park" closed quote,
21 listed in the Property Report.

22 Q. Okay. Let's look at Defendant's 146, please.
23 Let me give you -- and I'll let you look through it for
24 a minute, Vince, before I do it on the screen; 146, are
25 you with me?

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1 A. I'm on the page.

2 Q. All right. I just wanted to see if you had
3 been through it all yet?

4 A. Not all the way.

5 Q. Okay. Well, let's look on -- let's look at
6 the -- start with the last page please. This is a --
7 these are e-mails -- is that fair, Vince, is this --

8 A. Yes. This is between myself and Matt Walsh,
9 who was on Board at the time, I think; and with copies
10 to Bruce Kinney, who, I believe, was president of the
11 Board at the time.

12 Q. Okay. Where you were, Lee Ann, is just fine,
13 page -- all right. Is it Matt Walsh writing to you to
14 indicate that some resident is troubled by the
15 Creekside Park definition that had already been given
16 to the Board -- or the Assembly?

17 A. Yes.

18 Q. Ma'am, please highlight the bottom portion --
19 basically, the bottom half of that exhibit -- including
20 the top parts of that. Yes, thank you. Okay. And do
21 you see similar language about the Impact Assessment
22 referencing the park on Middle Street?

23 A. Yes.

24 Q. Okay. Do you see at the reference in the
25 second line, that that park on Middle Street is home to

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1 Alhambra Hall?

2 A. Yes, I see that assertion.

3 Q. That says "special event venue being used,
4 strikingly similar to our own Creek Club"?

5 A. Right.

6 Q. And it goes on to describe the same type of
7 description, at least, of comparing the Impact
8 Assessment belief that that's Alhambra Hall, to
9 determine what Creekside Park is; is that a fair
10 estimate -- a fair paraphrasing of what's going on
11 there?

12 A. Yes.

13 Q. Okay. And at the bottom, it describes that --
14 well, the jury will have it. I won't go through all of
15 it. But the point, I think, has been made. So why
16 don't we -- let's just be clear -- the Impact
17 Assessment doesn't show Alhambra Hall, does it?

18 A. No.

19 Q. So somebody, who is relying on that, to
20 suggest the Creek Club was going to be at Creekside
21 Park is misled?

22 MR. LUCEY: Objection; leading, Your Honor.

23 THE COURT: Overruled.

24 A. Yeah, they would.

25

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1 BY MR. DUFFY:

2 Q. Somebody would be mistaken?

3 A. They would be -- they would be mistaken, and I
4 think I have corrected that format here.

5 Q. And Matt asked you, would you -- it would be
6 great if you would clear up confusion -- do you see
7 that at the bottom?

8 A. "It sure would be great" -- "it sue would be
9 great if you could clear up what seems to be some
10 confusion. Feel free to give me a call if you prefer
11 to discuss."

12 Q. A little slip there with "sue".

13 A. Yes.

14 Q. I didn't notice that before. When you
15 looked -- at the page -- beyond that, to the next
16 e-mail from Vince, please Lee Ann -- okay. He's
17 forwarding the Impact Assessment, this is April 2,
18 2009; is that right?

19 A. I'm not sure where you -- I've got -- yeah,
20 April 2nd, right.

21 Q. And the next page, Lee Ann, forward is the
22 response -- well, it starts with a response. Let me --
23 okay, we'll go with that. Vince, is this your response
24 to Mr. Walsh?

25 A. Yes, it is.

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1 Q. Okay. And did you indicate -- well, let's
2 highlight the first two paragraphs please. Okay. Now,
3 you made some reference to -- well, the fact that
4 you -- let's -- I'll let you read the first paragraph
5 and tell me, are you indicating your belief as to
6 whether or not the I'On Company delivered on its
7 vision?

8 A. Yes, that's the indication.

9 Q. Okay. Now, you -- in the next paragraph, you,
10 in fact -- as you mentioned before, address the
11 Alhambra Hall suggestion; is that right?

12 A. Yeah, after I expressed to Matt that I hadn't
13 seen the document in a long time, and how ironic it was
14 that a member of the -- the leader of the opposition
15 now lived in the neighborhood. I said, your excerpt
16 wrote, quote "models and ideas expressed in the Impact
17 Assessment were very specific" end quote. I couldn't
18 agree more. The image above the caption, quote "park
19 on Middle Street in the Old Village" unquote -- closed
20 quote -- on page 6 of the Impact Assessment -- "is not
21 Alhambra Hall, but a smaller park about three blocks
22 southeast, at the end of Middle Street. I admire
23 Alhambra Hall, but could find no mention of it in the
24 document".

25 Q. Okay. Thank you. Let's look further down

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1 please, Lea Ann, in this e-mail. Okay. Let's go -- on
2 the same page -- do you see that?

3 A. I do.

4 Q. All right. And what are you saying here, Mr.
5 Graham?

6 A. Well, I can read it, but I'm referring to the
7 Sea Island Yacht Club in Rockville, the -- which was
8 the inspiration for the Creek Club.

9 Q. All right. And we heard Ms. Hussey testify
10 about that earlier?

11 A. Right.

12 Q. And is that Sea Island Yacht Club owned
13 commonly by residents around there?

14 A. No, it's a private club.

15 Q. Okay. And that was in reference -- in the
16 Impact Assessment; is that right?

17 A. Yes.

18 Q. Let's go down to the bottom, please. Well
19 yeah -- there we go. And before I get here, I'm trying
20 to go quickly, but I don't want to jump too far ahead.
21 You just look at the paragraph above it, and tell me
22 are you offering a description?

23 A. The paragraph above the one that's
24 highlighted?

25 Q. Right.

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1 A. That starts "like the Creek Club"?

2 Q. Well, tell me -- as you saw Ms. Hussey
3 testify, is there another association that I'On
4 referenced the Sea Island Yacht Club at -- in its
5 representation to people?

6 A. Well, it's represented in the Property Report.

7 Q. The Sea Island Yacht Club -- I'm sorry.

8 A. Oh.

9 Q. I'll get into that with an easier exhibit.
10 Let's go here. Okay. You indicated that Creekside
11 Park is the Marshwalk; is that right?

12 A. Yes.

13 Q. Okay. And on the next page, if you'll look
14 there with me, Vince, is it fair to say you give it a
15 distinction or a description of what linear parks are?

16 A. Yes, I'd say that's fair.

17 Q. Okay. And I want to look a bit here, Lee Ann,
18 at the -- at the thing that starts "hope this is what
19 you need" -- okay. Are you responding pretty directly
20 to Mr. Walsh's inquiry? The timing if you look at the
21 dates?

22 A. I'm writing to Matt and I'm responding
23 directly to him. I'm suggesting that he might explain
24 that further on the message board and give my full
25 description of what a linear park is to avoid any

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1 confusion.

2 Q. And you indicate that you'd be happy to talk
3 about it with them right?

4 A. Sure. I mean -- in hindsight, you know, the
5 close -- an example closer to home is simply the
6 battery, really, if you walk along the edge of the
7 battery -- or waterfront park is another good example,
8 where you can just walk along the water on Murray
9 Boulevard.

10 Q. Were there other -- tell me what other
11 facilities there are -- you can put that down please,
12 Lea Ann. Did the I'On Club build any other facilities
13 for boaters that were not referenced on the dock master
14 plan?

15 A. No, -- well, the I'On Club -- no, I'm not sure
16 if I completely understand your question, but...

17 Q. I'm sorry. I'm trying to be too fast, but we
18 started looking at the Property Report; is that right?

19 A. Correct.

20 Q. And there was a reference to a Creekside Park
21 and a community dock?

22 A. Correct.

23 Q. What other facilities did the I'On Company
24 provide for access to the water?

25 A. Well, we built the docks that are at the Creek

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1 Club.

2 Q. The docks and --

3 A. The boat ramp and -- and the parking lot
4 there.)

5 Q. And, ultimately, you did not convey those over
6 to the homeowners association free of charge; isn't
7 that right?

8 A. That's correct.

9 Q. Tell me about the decision to build the
10 boating facilities, and why you were doing it, and how
11 you did it?

12 A. Well, we were -- we were -- again, it's kind
13 of somewhat of a fluid process. But we had -- at the
14 time, we started really getting into the meat of
15 designing those facilities, we had gotten approvals
16 from the necessary authorities to build those. And we
17 were also building the swim and tennis club, and we
18 wanted -- the Creek Club was originally a part of the
19 swim and tennis club.

20 We wanted to make that attractive because we
21 didn't want -- the -- either the swim and tennis club
22 or the Creek Club to be just exclusive to I'On. We
23 wanted to make it open and available to anybody who
24 wanted to join it from any neighborhood. So to make it
25 more attractive, we -- and we put these boating

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1 facilities as part of the club, so they were available
2 to everybody in the neighborhood, first and foremost;
3 but if you join the club from outside of I'On, then you
4 can also use these facilities.

5 And by doing that, that helped a number of
6 things, and just being able to afford to build the
7 place and the facilities in the first place.

8 Q. And why have a club at all?

9 A. Well, it's -- I mean it's one more amenity to
10 the neighborhood if you chose to belong to the club,
11 you would have access to those -- well, if you are in
12 the neighborhood, if you lived in the neighborhood, if
13 you were a resident, you would always have those
14 facilities; but it would provide boating access to
15 the -- to the creek.

16 Q. Now, how about the -- where there -- you
17 mentioned pools, swim and tennis club, what else was
18 there that the Club developed in I'On?

19 A. Well, the swim and tennis club. There's -- as
20 you said, pools, tennis courts, there's a fitness
21 facility. There's greens that kids can play on.
22 There's the boating facilities here, was part of that
23 at the time.

24 Q. And how many pools; how many tennis courts?

25 A. There's -- well, two pools, plus a little

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1 kiddie pool there. I think there are seven courts
2 right now.

3 Q. Okay. And were there any references to having
4 pools and tennis courts in the 1998 Property Report?

5 A. No.

6 Q. Why not?

7 A. Well, they weren't intended to be conveyed to
8 the homeowners association, the Assembly.

9 Q. Well, the -- you reference that there were
10 going to be pools and tennis courts in the Impact
11 Assessment; didn't you?

12 A. Well, sure, we -- we, again, as I said, you
13 have to show all your impacts, what your big dream is,
14 what your big vision is to the town. And we also
15 included that there would be a small commercial
16 building; and, hopefully, one day schools and churches
17 and clubhouses.

18 Q. Now, ultimately, the 1998 report was amended;
19 is that right?

20 A. That's right.

21 Q. And tell me why and when you had amendments?

22 A. Well, as we progressed and we made further
23 improvements and further plannings, we would amend it.
24 We would update, for example, what percentage was
25 complete. So in terms of when, I mean, as you pointed

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1 out, the original property report was, I think,
2 November of '98; and it was subsequently amended in
3 2000 or 2001, I guess -- I'm getting lost on some of
4 these dates -- as you all probably do -- there's a lot
5 of dates, but it's part of the record.

6 Q. Okay. And did you -- when you made the
7 amendments, did you go back and write every homeowner
8 who had gotten a previous report?

9 A. No, we didn't, because we thought we were
10 delivering more than what was initially offered in the
11 1998 report.

12 Q. Let's look at --

13 A. I mean, that's my recall anyway. I was not
14 the general manager at the time they came out, but
15 that's my recollection.

16 Q. Okay. Let's look at Defendant's 140, please.
17 Do you recognize that, Mr. Graham?

18 A. I do.

19 Q. Please tell jury what that shows?

20 A. Well, this shows property that's being
21 conveyed, transferred property -- it's a transfer, but
22 it's part of a Charleston County, South Carolina --
23 part of their tax identification number, describing who
24 owns the property.

25 Q. Okay. And is that -- tell me what property is

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1 highlighted?

2 A. This is the Marshwalk, also known as the
3 Creekside Park. This is the first phase of that phase
4 II.

5 Q. Well, that's a good point, is there -- this
6 is -- you said this is the phase II portion of the
7 Marshwalk?

8 A. That's correct.

9 Q. Okay. I don't know that the pointer is still
10 here -- but can you show us what -- where the Marshwalk
11 continued?

12 A. Yeah. Okay. Again, there is the Marshwalk in
13 phase II. And as we purchased additional land, we
14 extended the Marshwalk, so this continues -- I think
15 this is to Ms. Adkins' house somewhere in here. So we
16 came around here, it keeps going, and continues off
17 that map. As has been said numerous times, it's a
18 little over two miles.

19 Q. Okay. But the portion deeded here is the
20 phase II portion, is that right?

21 A. That's right. From here to here.

22 Q. Okay. Everybody is familiar with the Property
23 Report that references trails and paths?

24 A. Right.

25 Q. Okay. Are there other trails and paths in

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1 phase II -- and I can show you a different picture if
2 that's not --

3 A. Yes, there are several. You can start here,
4 there's a trail here and it ends here, and it continues
5 on eventually. But the access -- there's several
6 trails at the ends of these roads, like this is Isle of
7 Hope Road here, and there's a trail here and there's a
8 trail here, and there's another trail here; and there's
9 likewise -- over on -- this is Saturday Road. There's
10 a trail to get down to here. There's another trail we
11 worked with the Olde Park developers, and built a path
12 here. It actually -- I think it's a sidewalk -- a hard
13 sidewalk now, but there are several trails and paths
14 all through.

15 Q. Okay. And there are sidewalks in every phase,
16 is that right, not just in phase II --

17 A. That's correct.

18 Q. That there are?

19 A. That's correct?

20 Q. And how about open spaces, are there other
21 open spaces in phase II?

22 A. Well, this is -- for example, this is open
23 space right here. That's what jumps out right away.

24 Q. Okay. I'll give you a greater picture of that
25 right now. I'll clear it up.

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1 A. This would be one, too.

2 Q. Okay. Let's look down and see the date,
3 please, on this transfer -- I believe it's the next
4 page.

5 A. November 2000.

6 Q. And what does that represent, Mr. Graham?

7 A. This is part of the common area that -- that
8 the I'On Company conveyed to the I'On Assembly, and
9 that says when it was conveyed.

10 Q. Thank you. I don't remember if that's 140 or
11 141, but let's look at the other one, whichever that
12 is. 141. Okay. And, Mr. Graham, can you just tell us
13 quickly what this document is?

14 A. It's a deed.

15 Q. And tell us what it's deeding and from whom?

16 A. This is deeding property to some of -- this
17 is -- we deeded a bunch of common area that -- at that
18 time, and phase I and phase II wraps into phase III,
19 which confusingly was built before phase II -- phase
20 III was built before phase II -- but this is -- I
21 think, it's -- this is the introduction to all the
22 properties that were conveyed by the I'On Company to --
23 ultimately, the I'On Assembly.

24 Q. On that date?

25 A. Yes.

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1 Q. Okay. Let's look at the list of properties at
2 the end, Lea Ann -- let's get some idea of what all was
3 being conveyed. Mr. Graham, do you know whether this
4 parcel that was being conveyed, that was highlighted as
5 the Marshwalk, do you know if that included the
6 community docks that we discussed, two and three?

7 A. It did include docks two and three.

8 Q. Okay. And, Lea Ann, why don't we just page
9 through there indicated -- there's a lot of property
10 being conveyed for that \$5 from the I'On Company to the
11 Assembly; is that right, Mr. Graham?

12 A. That's right. I mean, the biggest part, at
13 that point, I think, was the Eastlake Park, where Mr.
14 Clem lives. It's, I think, roughly 13 acres which was
15 the lake itself, and then the land all around it.

16 Q. Thank you. I ask you to look at Exhibit 50 A,
17 please. I'll give it to you first.

18 A. Which exhibit?

19 Q. 50 A.

20 A. Okay.

21 Q. Do you recognize what 50 A is?

22 A. Yes. It's the break down of the Creek Club
23 dock construction costs.

24 Q. And when is the last invoice date that you can
25 see for the Creek Club docks?

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1 A. March 2000. This was -- this was for the
2 lot -- docks two and three, which were finished before
3 dock one.

4 Q. Well, let's look at Exhibit 49, please, Lea
5 Ann. Mr. Graham, can you tell us what that is, please?

6 A. This is -- it's called a certificate of
7 occupancy. It's issued by the Town after a building
8 has been completed, certificating that it's okay to be
9 occupied. And this was that -- it's called a CO, if
10 you will, Certificate of Occupancy, and it's for the
11 Creek Club.

12 Q. Okay. So the Creek Club was finished and
13 ready for use on that date; is that right?

14 A. That's right, April 10, 2001.

15 Q. And you were talking a minute before -- and I
16 didn't catch it -- but when do you understand that the
17 Creek Club docks were completed?

18 A. Well, they were finished about this -- a
19 little bit earlier than that, late 2000, early 2001,
20 less than -- I think we have -- there's an invoice
21 about the painting or something for -- that was late
22 2000.

23 Q. All right. So, suffice it to say by this
24 date, April 10th, 2001, construction was complete on
25 both the docks at the Creek Club and the Creek Club

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1 itself?

2 A. That's correct. I mean, we still had to put
3 in landscaping, but the building was available for
4 occupancy.

5 Q. Vince, I'm going to hand you Defendant's
6 Exhibit -- what's been marked for identification
7 only -- as Defendant's Exhibit 182; are you familiar
8 with Defendant's Exhibit 182?

9 A. Yes.

10 Q. And without discussing it, just tell us what
11 it is?

12 A. Well, this shows a break down of costs for the
13 costs of the Creek Club building.

14 MR. DUFFY: Okay. I would like to move this
15 exhibit into evidence.

16 MR. LUCEY: No objection, Your Honor.

17 THE COURT: The exhibit is admitted without
18 objection.

19 (Defendant's Exhibit No. 182 admitted into
20 evidence.)

21 BY MR. DUFFY:

22 Q. Thank you. Vince, can you just tell me how
23 much the costs were to build the Creek Club?

24 A. Well, these are the -- the bottom line
25 document is \$606,165.70. I haven't read it carefully

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1 enough -- there may have been some architecture fees
2 and things like that, but that's what this is. These
3 were the amounts paid.

4 Q. Okay. Well, I want to make sure I understand
5 -- are you suggesting that there might be more to it or
6 that there might be less to it?

7 A. Well, there might be more -- there might have
8 been -- I mean, Jerry Keller was the architect from
9 Savannah, who was retained to design it. But I don't
10 see his costs down here, but that might have been part
11 of that, too, just the design of it.

12 Q. Okay. So you know these costs were paid?

13 A. Yeah.

14 Q. You just don't know if it included everything?

15 A. Right -- well, I can also see it didn't
16 include the cost of the land.

17 Q. My trusty partner reminded me that I didn't
18 ask you what the costs were of building the docks at
19 the Creek Club, which was on 50 A; do you still have it
20 with you?

21 A. Not open.

22 Q. This one. Okay. Vince, maybe if you turn
23 around, you will see the section blown-up; do you see
24 the bottom line figure?

25 A. I do, \$321,858.99.

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1 Q. And that's after applying a \$100,000 for GR
2 Funding; do you see that?

3 A. I do, yes.

4 Q. And what is that?

5 A. Well, that's the contribution made by the Olde
6 Park developers for access to the I'On Club.

7 Q. So, what was the actual cost figure?

8 A. I'm sorry. \$427,608.99.

9 Q. Thank you. Now, let's talk a little bit about
10 the operation of the Creek Club, can you tell me how --
11 just tell me how it was operated from the start?

12 A. Well, it was always intended to be an event
13 venue. It's a gathering place. There were weddings
14 held there. There was -- you could rent it for a
15 birthday party or a small business group or political
16 event. I remember some of the things we had -- the
17 I'On Trust had speakers there. We'd also -- the
18 Assembly, they had -- we had a rental agreement with
19 them, so they used it for -- from time to time for --
20 to hold events.

21 Q. And they paid for the use?

22 A. That's right.

23 Q. Now, in later years, before the sale to the
24 148 Civitas, did the I'On Group have someone who was
25 working down there for the I'On Club?

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1 A. Yeah, that would be Chad Besenfelder.

2 Q. Tell me about what Chad would do under the
3 Creek Club and building facilities?

4 A. Well, he was the coordinator with different --
5 basically he managed the building and the docks. He
6 would coordinate with -- with caterers, for example.
7 He used -- when it was rented out for weddings and
8 things, or if -- anybody could really use it, the
9 Assembly. He would also -- he was kind of charged with
10 policing the docks, if you will, particularly in the
11 summer time, when it got really busy down there. So
12 that was his charge.

13 Q. Okay. And would -- would Chad report about
14 activities associated with the docks?

15 A. He would.

16 Q. Tell me about that.

17 A. Well, he just let us know -- keep us informed
18 of what was going on. I mean, it's -- you know,
19 anybody who's been around boats and docks in the
20 summertime knows it's -- it can get a little bit crazy,
21 people drinking on the boats. And sometimes teenagers
22 go down there and drink, and -- I mean, that's just
23 kind of an invitation to have fun in a lot of different
24 ways, so he just kept us apprised of that.

25 Q. Okay. And do you have an understanding how

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1 much of Mr. Besenfelder's time was spent associated
2 with the docks versus other duties?

3 A. I don't know exactly. It was a lot of time,
4 and it was somewhat of a distraction. And Chad
5 originally came to work as part of the I'On Club, and
6 gradually we felt -- he performed so well, that he came
7 in and started working more directly for me as an
8 employee of the I'On Group, but it was very distracting
9 to answer your question, Brian. It was -- and so...

10 Q. Okay. Well, there's been some discussion,
11 which I'm sure you heard about, what parking is
12 available on civic lot six for the Creek Club; do you
13 recall that?

14 A. I do.

15 Q. And do you recall the suggestion that the
16 Creek Club can't operate without the overflow parking
17 lot down the road, civic lot 5?

18 A. I recall that.

19 Q. Okay. Do you have an understanding as to
20 whether the area designated for parking on civic lot 6
21 is satisfactory for the use of Creek Club?

22 A. I do. The Town's code requires that such
23 uses -- that you have one parking space per hundred
24 square feet of main hall. The main hall of that
25 building is 40 feet by 60 feet, it's 2,400 square feet,

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1 so you need 24 spaces, which can be accommodated upon
2 that parking lot immediately adjacent to the Creek Club
3 on CV-6.

4 Q. Okay. Right now, it has -- does it have that
5 design or a different design?

6 A. That design to accommodate all that parking?

7 Q. How many spaces?

8 A. Well, there's 18 parking spaces for cars. I
9 think there's six for golf carts. There are five that
10 we designed on the street immediately across the
11 street, intended for that. But it's -- it's not the
12 most efficient parking lay out. The spaces are bigger
13 than called for by the Town of Mount Pleasant which
14 specifies -- I think the minimum space requirement is
15 nine by 18, our spaces are bigger. It's also -- the
16 lay out, they could be designed better to easily
17 accommodate 24 spaces on the site.

18 Q. There's enough space there then?

19 A. Absolutely.

20 Q. Let's look at Defendant's Exhibit 23, please,
21 Lea Ann. And let's look at the table -- hang on first
22 a second -- let me identify this. We haven't seen this
23 quite so much. The date of the report at the bottom is
24 not the 1998 report; this is a 2000 report; do you see
25 that, Mr. Graham?

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1 A. Yes.

2 Q. Okay. Let's look at the April 10, 2000, let's
3 go to the table, please, Lea Ann, which maybe it's 22
4 of this document -- there we go. All right. Let's
5 highlight phase II portion, please. Okay. Do you see
6 there an indication that the Marshwalk was going to be
7 provided?

8 A. Yes.

9 Q. And tell me -- take a look at this and just
10 give me an idea of your thoughts on what's represented
11 here; and, in fact, whether you're further along or
12 not?

13 A. Well, this shows our -- what are now familiar
14 terms of Creekside Park, which has since been renamed
15 the Marshwalk. I had been on vacation up to Newport,
16 Rhode Island before this, and walked -- there's a
17 beautiful park in Newport called Cliffwalk, that you
18 walk in front of all of these houses, and so it's a --
19 really an inspiring, beautiful place. And so I renamed
20 our Creekside Park the Marshwalk. It shows that it's,
21 at this point, it's 50 percent complete.

22 The estimated date of start of construction
23 2/2000, and estimated date available for use was June
24 2000. No financial assurance at completion, but it
25 would be part of the annual assessment, and then the

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1 same for community docks.

2 At this point, we had gotten permitted for more
3 docks, so we showed docks -- plural. And then the same
4 sidewalks, paths and trails, and parks, open space; and
5 those were -- the sidewalks, paths and trails were
6 complete at that point; parks and open space, 70
7 percent.

8 Q. Let me stop you there for a second.
9 Sidewalks, paths and trails are 100 percent complete,
10 right?

11 A. Yes.

12 Q. And how complete is Marshwalk?

13 A. Well, it says 50 percent.

14 Q. And the date for the community docks, when
15 those are expected to be available?

16 A. September, 2000.

17 Q. All right. Now, do you recall, without
18 pulling it back out, the exhibit indicating when the
19 Marshwalk and community dock were deeded over?

20 A. That was -- I want to say November, 2000.

21 Q. I believe that's accurate. Let's look at
22 the -- page 36 of this -- page 33 -- and, Mr. Graham,
23 are the property reports, the three of them that are
24 issued, do they apply to particular properties?

25 A. Yes.

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1 Q. Okay. And do you see here in the 2000 report,
2 there's a listing of lots?

3 A. Yes, I see that.

4 Q. And is the -- was the idea of practice, as you
5 understood it, who would receive the property reports?

6 A. Well, the people who were considering
7 purchasing lots and were going to contract.

8 Q. And do those -- are those -- anyone or what
9 lots -- what's lot --

10 A. Well, specifically, these lots that are
11 listed. So the prospective purchasers of those lots
12 would be -- would receive those reports.

13 Q. And even the -- on this one in 2000, what is
14 the final phase that's indicated that would be any lots
15 that this applied to?

16 A. It says that is 63 lots that were in phase IV.

17 Q. Do you recall which phase Ms. Adkins purchased
18 in?

19 A. I believe her lot is in phase V -- no -- yeah,
20 it's in phase V -- maybe -VI.

21 Q. Now, do you know -- you've seen the
22 exhibits -- Defendant's Exhibit 150, I believe it is,
23 with the list of the 1998 Property Report receipts?

24 A. I have, yes.

25 Q. And do you have an understanding -- tell me,

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1 did anyone at the I'On Company do an analysis of the
2 people who received that report and whether --

3 A. Yes.

4 Q. Tell me about that, please.

5 A. Well, we just went through my assistant -- Pam
6 Martin, just kind of went through it and compared it to
7 the people who live there now, that's in the Assembly
8 directory. And I think there's like 50 -- 54 people
9 who received that report, something like that.

10 Q. How many residents are currently in I'On?

11 A. Well, there's close to 2000 who, I think, that
12 there's -- about 730 or 740 homes built. The average
13 size household is 2.6 or so.

14 Q. Lea Ann, let's look at Defendant's Exhibit 22,
15 please, at the very end, it's Property Report -- a
16 Property Report we haven't seen yet. Okay. Is this --
17 Mr. Graham, tell me what this page is?

18 A. Well, this is just an acknowledgment that they
19 received the Property Report.

20 Q. Okay. And, Lea Ann, please look at the page
21 before that. What is this? Without looking at the
22 handwriting on it, tell me what the document itself is,
23 please?

24 A. Well, it's the purchaser receipt acknowledging
25 it.

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1 Q. Did you have an understanding that there were
2 two receipts associated with the property report?

3 A. Uh-huh.

4 Q. Who would get the receipts?

5 A. Well, the purchaser and then the seller.

6 Q. Let's look at Defendant's Exhibit 137, please,
7 ma'am. Mr. Graham, you heard Mr. Clem this morning
8 discussing a proposal that had been referenced several
9 times about the sale of civic lot 6 to the Assembly; do
10 You see that?

11 A. Yes.

12 Q. Please take a look at Exhibit 137 and tell me
13 what that is.

14 A. Well, it is titled -- it is a proposal to
15 amend the I'On Planned Development Zoning Ordinance.
16 And this was a proposal that we were making to the I'On
17 Assembly in August of 2007, and we were making this
18 offer -- this proposal would be good through the end of
19 the year, 2007.

20 Q. Now, ultimately you wrote again and said that
21 you weren't going to continue with that offer; is that
22 right?

23 A. That's correct.

24 Q. And tell me why.

25 A. Well, this -- I guess, maybe it would be

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1 helpful to explain the overall. You know, as has been
2 described, there are a number of civic uses in the
3 neighborhood, including -- well, there's the -- the --
4 an Orthodox Church and Holy Ascension. There's another
5 church -- actually my church -- that's built, a branch
6 of the church, Holy Cross. There's a charter school,
7 East Cooper Charter Montessori School.

8 And then we set up -- at the beginning of the
9 neighborhood, we set up a trust -- a not-for-profit
10 trust. That purpose was intended to -- to advance
11 cultural and artistic activities in the East Cooper
12 area, not just in I'On, but in the East Cooper area.
13 So things that the Trust does, for example, they would
14 have -- hold concerts and the Charleston Symphony would
15 come and have it at the amphitheater, or have it on the
16 ball field, and people would come; or have speakers,
17 or -- or work with folks in the Town of Sullivan's
18 Island, to do things at Fort Moultrie.

19 And when we set that up, just this -- this is
20 going off on a tangent a little bit, but I think it's
21 important because we felt that was very important in
22 the neighborhood to have something like that, and it
23 was funded -- we provided the initial funding to it and
24 then we worked in a transfer fee, so that every time a
25 property is sold in I'On, whether we sold it or -- or a

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1 future buyer sold it, a percentage of that sales
2 proceeds would go to fund the Trust.

3 And so what we wanted to do, our kind of
4 operating philosophy is to be inclusive and do things
5 that are -- to mutual advantage, both to ourselves and
6 to others.

7 And so we had this -- we saw as we were
8 developing the property -- and as I described earlier,
9 it was kind of a fluid process. We were going to have
10 this leftover land. And so being business people in
11 the development business, we wanted to see if we could
12 get extra lots on that extra land.

13 And so we saw that as a time -- again, as a
14 mutually beneficial arrangement, where if the -- the
15 Assembly, who we approached first, would come in and
16 support us in this effort, then we would take a share
17 of every lot sold.

18 Q. Lea Ann, can you blow this up, please.

19 A. It was like \$60,000 or something. We have --
20 I can't remember -- yeah, \$60,000 right here in the
21 second paragraph, for each lot. And we would come up
22 with a pool that would amount to -- you can see this,
23 up to 2.8 -- \$2.9 million dollars almost, and we would
24 contribute that to be split between the Assembly, the
25 I'On Trust, the churches, the school.

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1 And then also, with a little bit of money,
2 \$200,0000 left over, to design and construct a
3 roundabout at the entrance to Muerhead Road, which was
4 another connection -- that's another one of our
5 operating philosophies, is we would like to connect to
6 the surrounding neighborhoods.

7 Q. Now, I think we heard some discussion that
8 people were worried that it was going to be too
9 congested and -- and your suggestion here, your
10 proposal, was to have another entrance; is that right?

11 A. That's correct. Because now as -- as it's
12 designed now, I can show y'all in the plan, but we have
13 kind of a main spine road that goes from the roundabout
14 on Mathis Ferry all the way to the Creek Club, and so
15 there's other access points to other neighborhoods, two
16 other neighborhoods, and other access points to Mathis
17 Ferry; so that it enables traffic to defuse rather than
18 be concentrated. And this would be just one more
19 access point to allow traffic to flow out to Muerhead
20 Road, as opposed to everything going into that main
21 road, so that was the purpose of doing that.

22 Q. Now, you haven't actually been approved or
23 formally proposed phase XI; is that right?

24 A. Well, we proposed it before. I mean, we have
25 worked with Assemblies prior to this one.

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1 Q. I'm sorry. Outside of the Assembly, have you
2 gotten it approved by the Town?

3 A. No, it hasn't been approved.

4 Q. Now, did you actually apply to have the extra
5 entrance at Muerhead Road approved?

6 A. Well, not at this time. As part of our
7 original plan, we wanted to do that back in 1995.

8 Q. And have you made any efforts, independent of
9 this, to get that done?

10 A. Well, subsequent to this, we, again, worked
11 with one of the Assembly Boards a few years ago, toward
12 this end; and we continued to have discussions about
13 it. We had committed, as part of a compromised plan,
14 to take that off the table, that connection, because
15 there was a lot of resistance from the other
16 neighborhoods, Hobcaw Point residents, in particular.
17 So we took that off the table, and committed not to ask
18 for it again, but other people could ask for it. For
19 example, the Assembly could potentially ask for that.

20 Q. And that had been something that was brought
21 up as a problem with your proposal, there was going to
22 be another exit?

23 A. Correct.

24 Q. Let's look at exhibit -- well, tell me this,
25 do you know of residents at I'On who fought your effort

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1 to get another entrance or exit point?

2 A. Well, initially -- and I have to go back -- I
3 forget these things -- but I'On took a long time to get
4 approved in the beginning. We had -- as described by
5 Ms. Adkins yesterday, there was a '95 attempt that was
6 voted down five to four by the Town Council.

7 And then there was another one that was in '97,
8 early 1997, that that's what the impact statement --
9 Impact Assessment, that was part of that application,
10 that was done in, I think, December '96. It was for
11 that effort to get it approved. And there was a lot of
12 opposition then, too, including from Mrs. Adkins'
13 companion.

14 Q. And that's Mr. Brock?

15 A. Mr. Brock, yeah.

16 Q. Well, tell me then -- you said there was
17 opposition, there was a second plan; what was different
18 about the second plan than the first plan?

19 A. Well, I guess the first thing we've just been
20 taking about, we removed that connection to Muerhead
21 Road. That was no longer part of the plan. We also
22 reduced the number of homes in the neighborhood from
23 850, which was the last proposal we had given -- the
24 one that was voted down in 1995, to 759 at the time.
25 The amount of commercial square footage from -- I think

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1 the last proposal was 60,000 to 30,000 square feet.

2 Q. What types of homes were taken out of your
3 plan?

4 A. Well, that's what I was getting ready to say,
5 we had to take out multifamily homes, too. It
6 originally envisioned apartments and condominiums,
7 because not everybody can afford or even wants a single
8 family house, and we wanted -- just like you have in
9 downtown Charleston, these surrounding blocks. You
10 have a mix of these types of houses. And, again, our
11 kind of operating philosophy is to be more inclusive
12 and include all these different companies, because it's
13 not -- we recognize it's not for everybody, but that's
14 what we wanted to offer in the neighborhood. So those
15 were taken off in an effort to win support of the
16 majority of town council, which we ultimately got.

17 Q. Okay. And did the battle against your
18 development continue?

19 A. Well, it did. We received final approval from
20 the town council in March of 1997. And then a group of
21 the most fierce opposition gathered up a petition to
22 hold a referendum on our zoning. They petitioned the
23 town council to revisit the rezoning -- the rezoning
24 changed. Town council voted not to do that. And then
25 went forward with a referendum.

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1 We challenged that referendum in court because
2 we didn't think it was appropriate, given all the
3 amount of time we had spent to get approval and make
4 this -- you know, go through the proper procedure. And
5 ultimately -- that took a long time. And ultimately
6 that decision was made by the Supreme Court, that ruled
7 in our favor, the South Carolina Supreme Court.

8 Q. Okay. So when -- do you recall generally when
9 that was?

10 A. Well, the -- the original hearing was from the
11 South Carolina Circuit Court. And I think it was
12 October of '97, after we had started construction. And
13 Judge Markley Dennis ruled in our favor. And then it
14 was appealed by the opponents, and then it went all the
15 way to the South Carolina Supreme Court. And I think
16 that decision was rendered in January 2000, but I'm not
17 positive. We can Google it.

18 Q. So, in November of 1998, there was -- let's
19 say, you weren't sure you were even going to have the
20 zoning approved, did you, that you had worked for?

21 A. Well, that's right, we weren't sure. And so
22 that's why -- another reason, yet again, why we had to
23 be very conservative in what was represented,
24 because -- you know, we might not have even had a
25 chance to own it if -- if the Supreme Court, the

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1 decision had come down at some point at that time, and
2 said, no, you're not allowed to -- they can have a
3 referendum and they can vote out your zoning. And we
4 might not have even been able to move forward.

5 I mean, it was so -- it was really tenuous.
6 And, you know, we're a small family company. It was my
7 dad and brother, Geoff, and me, trying to do this. And
8 we were trying to, you know, take down the property in
9 bite size chunks to move forward, but it was -- it was
10 tough, it was really challenging. And it's challenging
11 enough to just develop property in general, keep track
12 of everything that's going on, but then to have to
13 fight this legal challenge is even tougher.

14 THE COURT: Mr. Duffy, I got a note that lunch is
15 here and I'm seeing some folks kind of shift around.
16 How much longer on direct do you have? I don't want to
17 cut you off.

18 MR. DUFFY: I have a lot --

19 THE COURT: All right. Ladies and gentlemen, I'm
20 going to give everybody a break right now so y'all can
21 enjoy your lunch. I'll give the attorneys a break and
22 the witness. So, if you would, please return to your
23 jury room for lunch. We will -- I need give to give
24 the attorneys and everyone a chance to get something to
25 eat, so I'll give y'all about 45 minutes or so for

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1 lunch. Please don't discuss the case yet. And I
2 apologize for interrupting the testimony. I just think
3 it's the right time to do it.

4 MR. DUFFY: I don't want to be starving anybody.

5 THE COURT: No. Well, they need to be able to pay
6 attention, as do I, and I'm hungry.

7 (WHEREUPON, the jury leaves the courtroom at
8 1:04 p.m.)

9 THE COURT: All right. Mr. Graham, as soon as
10 they get out the door, you are welcome to come on down.
11 All right. We'll be at ease until about -- I don't
12 know 1:40/150ish. And then y'all let me know if I --
13 I'm still going through some of the various legal
14 arguments -- I know one directed verdict arguments --
15 again, later -- just ballpark, Mr. Duffy, Mr. Young,
16 how many witnesses do you think you have left after Mr.
17 Graham; if you don't mind?

18 MR. DUFFY: Most likely two more.

19 THE COURT: Two more. Okay. Great. All right.
20 Good. Well, then, we can maybe look at jury charges
21 this evening or later this afternoon after we finish
22 with the testimony. I imagine Mr. Graham will have a
23 little bit more time on the stand after this, but we'll
24 just see how far we get. Thank you. All right. Y'all
25 have a nice abbreviated lunch.

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1 (WHEREUPON, a lunch break was taken.)

2 THE COURT: Is there anything we need take up
3 before we -- is everybody ready for the jury? Let's go
4 ahead and bring them. They can come in. I won't fuss
5 at anybody for a little while.

6 (WHEREUPON, the jury enters the courtroom at
7 approximately 1:52 p.m.)

8 THE COURT: All right. Thank you. I appreciate
9 it. Ladies and gentlemen, I hope you enjoyed your
10 lunch. We've got Mr. Vince Graham back on the stand
11 and we are ready to continue with his examination.

12 MR. DUFFY: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 BY MR. DUFFY:

15 Q. Lea Ann, could you please put up Plaintiff's
16 Exhibit 3, at page eight again, this is page 3, Impact
17 Assessment. I want to touch on one other thing,
18 please, Vince. Can you tell me what is planned or
19 envisioned in the Impact Assessment as referenced at
20 the top of page with -- whichever page that is?

21 A. Well, this envisions that over 75 percent of
22 the marsh frontage and the water frontage and the lake
23 frontage would -- excuse me -- would take the form of
24 parks, that there would be linear parks around the
25 lakes and alongside the marsh creek -- the Marshwalk,

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1 all the marshes and waters of Hobcaw Creek. And it
2 says 75 percent, I think we actually delivered about 97
3 percent or 98 percent, something like that.

4 Q. Okay. And this is talking about access --
5 providing access and not ownership; is that right?

6 A. That's correct.

7 Q. Now, how much -- how much of that is --
8 whatever percentage you offered, how much has actually
9 been deeded over to the homeowners association?

10 A. Well, I mean, about the same amount. I think
11 there's still a little bit of the Marshwalk that's been
12 built -- I think it's been deeded over. If not, it was
13 in the process of being deeded over. And there's
14 the -- of course, the CV-6, which was -- that was --
15 that's where we provided the easement, the perpetual
16 easement.

17 Q. That was access?

18 A. Right. And there's a little bit more, but
19 that wasn't -- all the lake frontage and everything
20 else was, too.

21 Q. Okay. So tell me what percentage did you use
22 a minute ago -- 97 or 98 percent?

23 A. Ninety-seven or 98 percent.

24 Q. And that was referring to access?

25 A. Correct.

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1 Q. And you're saying roughly -- tell me what
2 percentage was actually deeded over as ownership for
3 the homeowners association?

4 A. Well, right -- well, roughly 97 percent.
5 There's a little bit of marsh that's part of some -- on
6 the northwest side of the -- or northeast side of the
7 property -- I'm sorry -- that was behind a few of the
8 houses over there that wasn't deeded over.

9 Q. Okay.

10 A. Or wasn't -- there was no access provided to
11 them.

12 Q. Let me ask you to look at what's been marked
13 for identification as 164 A -- well, actually I'll do
14 164, and look behind it at 164 A, please. Are you
15 familiar with those photographs?

16 A. Yes.

17 Q. And do you know what they are photographs of?

18 A. Well, they are photographs of the community
19 docks. The first one is -- shows docks two and three,
20 and then --

21 Q. And 164 -- I'm going to show the jury --

22 A. That's 164. I'm sorry.

23 Q. -- in a minute. And 164 A shows what?

24 A. 164 shows two and three also. And then you
25 can see in the background, the pavilion dock, the

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1 community dock at the -- at the Creek Club, one of the
2 docks there.

3 Q. Okay. Is it fair to say by looking at
4 these -- that 164 shows two and three at low tide and
5 164 A shows them at high tide?

6 A. Yes.

7 Q. Okay. 164 A, there is some people there, do
8 you know who's -- who's shown in the picture?

9 A. Yes. Those are -- that's [REDACTED]
10 [REDACTED] ph) the little girls. And then that's Dave
11 Allenberg and they live in I'On.

12 Q. And that's a photo of them on the dock three;
13 is that right?

14 A. Yes. Taken from the end of the float on dock
15 three, looking -- looks like northeast, back to the
16 other two docks.

17 MR. DUFFY: All right. I would like to move into
18 evidence, Exhibit 164 A.

19 MR. LUCEY: No objection, Your Honor.

20 THE COURT: 164 A is admitted without objection.

21 (Plaintiff's Exhibit No. 164 A admitted into
22 evidence.)

23 BY MR. DUFFY:

24 Q. Now, before we show it, did you ask Mr.
25 Allenberg to take this photograph?

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1 A. No.

2 Q. But he sent it to you; is that right?

3 A. He did.

4 Q. Okay. Let's look, please, first at 164. Just
5 to get a full understanding, tell us, please, what this
6 is again, please, Mr. Graham?

7 A. Well, again, this is the community docks that
8 have been referred to as two and three. The one on the
9 left is three and the one on the right is two.

10 Q. And it's a low tide version; is that right?

11 A. That's right.

12 Q. And then 164 A, please.

13 A. And this -- in the foreground, the one that
14 Zoe is jumping off of is three, and the one in the
15 middle -- so this is three, this is two. And then in
16 the background, you see the dock pavilion and that's
17 one. So this is the creek, the tributary, we now call
18 Shelmore Creek, flowing into Hobcaw Creek in the
19 distance.

20 Q. And do you have an understanding whether
21 residents use these docks two and three in the way that
22 the Allenbergs do?

23 A. I know that some do. I mean, I've seen boats
24 docked there and you can crab off of it, too. Fish,
25 crab, swim; dock your boat.

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1 Q. Okay. Let's look at 167, please, Lea Ann.
2 And, Vince, this shows the boat ramp; is that right?

3 A. It does, yes. This is the boat ramp.

4 Q. And the gentleman is sitting on the staging
5 dock; is that right?

6 A. He is, yes.

7 Q. These are a part of the boating facilities,
8 correct?

9 A. That's right.

10 Q. And --

11 A. He's sitting on the staging -- what we call
12 the staging dock, adjacent to the boat ramp.

13 Q. And there's been some discussion about Olde
14 Park residents getting access through the I'On Club to
15 use the boating facilities; do you recall that?

16 A. Yes, I do.

17 Q. Do you have an understanding of roughly how
18 many -- well, tell me this: You have to go through
19 some sort of process to indicate you're going to use
20 the boat ramp?

21 A. It's my understanding, I think it's -- they
22 still do it this way, you have to pay a key deposit and
23 provided a key to get you access to put your boat in at
24 the ramp. But you have to be a member -- if you are
25 living outside of I'On, you have to be a member of

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1 the -- of the I'On Club to be able to access it.

2 Q. Do you have an understanding as to how many
3 residents of Olde Park, around this time, are
4 registered to use the boating facilities?

5 A. I see that there are six.

6 Q. Okay. Do you have an understanding as to a
7 maximum number at a given time period that -- of Olde
8 Park residents, who have been registered to use the
9 boating facilities to your knowledge?

10 A. I think -- looking back at it, there's been a
11 maximum of 10 over the years.

12 Q. Ten people registered to use the boating
13 facilities?

14 A. Correct, from Olde Park.

15 Q. Right. Mr. Graham, I'm going to hand you
16 what's been identified as Defendant's No. 181. And let
17 me talk a minute about -- we've had some discussion
18 about the easement, the Recreational Easement and Use
19 Agreement; do you recall that?

20 A. Yes.

21 Q. And tell me what your understanding was from
22 the time it was created until the 2009 timeframe?

23 A. Well, my understanding is that it was a
24 perpetual easement, last forever and all -- anyone who
25 was a resident of I'On, that would provide access to

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1 the boating facilities, staging dock, and the boat
2 ramp, and the larger pavilion dock.

3 Q. Okay. Well, tell me this: You understand
4 that -- well, do you -- does the I'On Company receive
5 the Living In I'On newsletter or is it provided by any
6 of the residents to the I'On Company?

7 A. Well, yes. I mean, of course my father and
8 general manager, Chad Besenfelder, they -- my family
9 has -- my parents have a house there and Chad has a
10 house there. And they get documents like this from the
11 I'On Assembly.

12 Q. Okay. And tell me what is Living In I'On,
13 what is this?

14 A. This is just a monthly newsletter that -- this
15 one was put out by Bruce Kinney, who at the time, in
16 March, 2009, was the president of the homeowners
17 association and I'On Assembly.

18 Q. Okay. And are you familiar with this
19 document?

20 A. I am. I've seen it before.

21 MR. DUFFY: I would like to move into evidence
22 Defendant's Exhibit 181.

23 MR. LUCEY: No objection, Your Honor.

24 THE COURT: Defendant's 181 is admitted without
25 objection.

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1 (Defendant's Exhibit No. 181 received into
2 evidence.)

3 BY MR. DUFFY:

4 Q. Do you see at the top there, Mr. Graham, the
5 headline is the Creek Club sale?

6 A. Yes, I do.

7 Q. Okay. I want to focus in on the paragraphs
8 that are second and third to the bottom; do you see
9 there that it references -- tell me, read the first
10 sentence for me please.

11 A. Okay. It says "an agreement to amend the
12 Recreational Easement was reached quote, in principle,
13 closed quote in January. However, it was put on hold
14 pending the outcome of a zoning appeal filed by an I'On
15 resident. That appeal was heard by the Town of Mount
16 Pleasant on February 23rd, upholding the planning
17 department's decision that the current use of the club
18 as a venue for weddings, receptions and similar special
19 events, is permitted pursuant to provisions in the
20 original zoning ordinance".

21 Q. Okay. So the agreement was put on hold while
22 there was that appeal; is that fair?

23 A. Yes.

24 Q. Okay. And how about the next paragraph,
25 please?

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1 A. "I'm now pleased to report that assuming Mike
2 Russo and his partners buy the Creek Club, as planned,
3 they have agreed to amending the recreational easement
4 in a way that is significantly beneficial to I'On,
5 including a new provision guaranteeing Assembly access
6 in perpetuity."

7 Q. That's far enough. So did -- at this time,
8 did Mike Russo continue forward as referenced here?

9 A. He did.

10 Q. Did you -- was there a break in -- tell me
11 this, did the I'On Club have an agreement with Mike
12 Russo that ultimately he -- he said he wasn't
13 interested in it anymore?

14 A. We did, yeah. It was -- we had negotiations.
15 We felt like we had an agreement in principle, and then
16 he backed out of that and then it went forward again
17 later.

18 Q. Did you have an understanding of why Mr. Russo
19 backed out of the original agreement?

20 A. Well, I know he -- he thought that it was
21 in -- the zoning was in jeopardy one time.

22 Q. And that was a similar concern at -- that put
23 on hold the easement agreement in principle with him
24 and the Assembly; is that right?

25 A. That's right.

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1 Q. Now, Vince, I want to, -- I don't want to take
2 too long doing this, but as things have come out about
3 I'On sort of piecemeal before you had a chance to talk
4 about it -- and I want you to, at least, give a -- give
5 the jury a summary of what the idea is behind I'On;
6 what is the traditional neighborhood?

7 A. Okay. I'll try to be brief. Well, the idea,
8 the concept is -- it's really not new. And it was
9 inspired by older neighborhoods and towns and cities.
10 Charleston is a great example that -- the historic part
11 of Charleston where, you know, they were built before
12 even we had cars. It's hard to believe that time, but
13 it is a mix of uses. When I say "uses", residential
14 uses, different kinds of residential, commercial uses,
15 civic uses. Like just in the few blocks around where
16 we are sitting here, I mean, you have a number of
17 different churches, and you have different kinds of
18 housing. You have City Hall. You have commercial
19 businesses, courthouses. And it's all kind of -- close
20 knit tied together. It's fairly compact.

21 Over the last 60 or 70 years, we've gotten more
22 toward designing and building neighborhoods that are
23 more oriented around the car and they're separated.
24 And so -- they have separate entities. I think Julie
25 Hussey described it yesterday, where you have -- even

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1 with residential, you have a certain price point of
2 homes segregated in one area, and another price point
3 segregated in a second, and another in a third, and
4 people don't -- they are not mixed up.

5 And that's really different from the historic
6 patterns of the way things were developed, not only in
7 South Carolina, but all over the world. And so the
8 gist of it is -- well, part of it is, is that we -- and
9 again, as I think Ms. Hussey described quite
10 eloquently, you want to create a place that people come
11 together.

12 And I think what -- one of the things that sets
13 ours far and apart, not just at I'On, but the other
14 neighborhoods that we've been involved in developing --
15 is we spend a lot of time and effort on these common
16 areas that are owned in common -- or shared in common.
17 The streets and parks and -- and they don't -- I don't
18 really think it's possible for any one person to create
19 a community, I think it's a sense of community emerges
20 from people who live or work in a place. But I do
21 think it's possible to facilitate a sense of community,
22 provide conditions to make it more -- to make it -- to
23 enable that kind of people to interact with one
24 another.

25 And, again, I'll be the first to say, this is

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1 not for everybody, but a lot of people like that. And,
2 it's -- you know, just people come out their front door
3 in the morning to get their paper or -- or go for
4 walks, they -- they just kind of informally get to know
5 one another and that helps form bonds of the community.
6 So that's -- I don't know if that is -- that's as brief
7 as I can be with involvement. I can go on and on about
8 it.

9 Q. We'll stop there. Thank you. Let's look --
10 let's briefly back through with the Defendant's Exhibit
11 8. Again, tell me what the picture represents, please?

12 A. Well, this is an aerial view of the land that
13 would become I'On. It was taken from a piece -- coming
14 from the southeast, looking to the northwest. And the
15 bottom left hand corner, this is Mathis Ferry Road, and
16 this is what would become Eastlake. This is the
17 Westlake. This is what we call the rookery, which is a
18 nesting area for wading birds.

19 And this is the Hobcaw Creek coming in here.
20 This is -- you can't see it, it's kind of washed out,
21 but this is the Wando Shipping Terminal. Daniel Island
22 is over here. Hobcaw comes -- flows into the Wando
23 River and that joins with the Cooper River, and that
24 goes under the Ravenel Bridge.

25 This is Hobcaw Point, a neighborhood that was

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1 developed in the '50s, '60s and '70s. And this is
2 Molasses Creek that was developed in the '80s.

3 Q. Vince, you mentioned the rookery, can you tell
4 me a little bit more about that?

5 A. Well, just as further background, we -- we
6 purchased the property from a family, the Jordan
7 family, who lived in Columbia. And their family was
8 actually -- had been in the site work business for a
9 long time. They built roads and highways and things.
10 And they had purchased the property back, probably
11 about 40 years ago, because it was relatively high
12 above sea level. And then they mined the dirt to use
13 in the road building business. And in the process,
14 they built these lakes.

15 And this was made from an old one, and it was
16 more naturalized. And it has these little -- do you
17 see these little tiny islands in the middle, and so
18 birds would come -- wading birds would come, egrets,
19 ibis and things, they would come and nest in that area.

20 Q. They have paths and trails?

21 A. Well, we -- we -- we planned this so that
22 there was a buffer around it, and then there is a trail
23 that runs -- you can go all the way around it. And
24 there's a couple of -- we built these observation
25 towers that kind of back away from the pond, but you

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1 can walk up there and see the bird life.

2 Q. Who owns that property?

3 A. The Assembly.

4 Q. Okay. Let's look at the next slide, please,
5 Lea Ann, 8 -- I mean 9. Okay. Fall of 1998 is the
6 time, roughly speaking, when the Property Report was;
7 issued; is that right?

8 A. It was November '98, yes. So late Fall.

9 Q. Okay.

10 A. The property Report was late Fall.

11 Q. And, briefly, can you tell us what development
12 was going on at that point?

13 A. Yes. This is what we called phase I (a) where
14 these homes are. The first of 41 homes that were built
15 in the neighborhood.

16 This -- you can see the Mathis Ferry cut through
17 right here. And so at that time, we had just purchased
18 the land around Eastlake from the Jordan family, and we
19 built this road. We're putting -- when you develop,
20 you plan -- you get an engineer, and then you build the
21 water and sewer lines of the utilities, and the
22 streets, and sidewalks and curbs, and all that. So you
23 can see how we built that and houses have started
24 construction over here.

25 I think the -- these were houses that were under

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1 construction at the start. The first house was
2 finished right there. And my brother, Geoff's house,
3 was right there. And you can see also where -- work on
4 these other roads and another part of the development.

5 Q. Where is phase II, Vince?

6 A. It's not on this map. It would be way up
7 here. I mentioned earlier that we -- we started phase
8 III in front of phase II, but that phase III would have
9 come over -- it was an extension of Sowell Street right
10 there.

11 Q. Okay. I'm going to ask you to look at what's
12 been marked for identification as Defendant's 168,
13 please. Do you know what Defendant's 168 is, Vince?

14 A. Yes.

15 Q. Tell me briefly what it is, please.

16 A. Well, this shows two plans, two different
17 plans for I'On, one of the original plans that was done
18 in 1995, and another one that was done -- it says 2012
19 at the top, and this may have been done some years
20 before that. But it's a comparison of how the plan
21 evolved and changed over time.

22 Q. And who put together this comparison?

23 A. I did.

24 MR. DUFFY: I move into evidence Defendant's
25 Exhibit 168, Your Honor.

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1 MR. LUCEY: No objection.

2 THE COURT: Okay, 168 is admitted without
3 objection.

4 (Defendant's Exhibit No. 168 admitted into
5 evidence.)

6 BY MR. DUFFY:

7 Q. Okay. Just to give a little background, 1995
8 is -- tell me what that -- again, what is represented
9 there? Some drawings?

10 A. Yeah, it shows the conceptual master plan at
11 the time, in 1995. We would -- before we even begin
12 construction or even purchase the property, we would --
13 we hire land planners. In this case, we hired two land
14 planners and they collaborated on the effort, Duany
15 Plater Zyberk was one of them; and Dover Kohl &
16 Partners was the other one, so this was the -- one of
17 the plans that their offices came up with.

18 Q. Okay. In 2012 is some representation of what
19 had gone on at the time -- or what the development
20 became?

21 A. Yeah. You can see -- I mean -- and I think I
22 mentioned that one of the things that we try to do is
23 create a commons, a public area, that is very conducive
24 for people coming to know one another. And part of
25 that is to try to calm the traffic speed through

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1 streets. Because if the cars are going really fast,
2 it's less safe for pedestrians or bicyclists, and
3 particularly children.

4 Q. Vince, why don't you show us what some of the
5 public spaces are -- and I'm not going to ask you to
6 identify all of them, but give us some highlights of
7 public spaces and civic lots, just to show where they
8 are.

9 A. Well, the -- okay. In which -- in both plans?

10 Q. No, as developed.

11 A. Okay. Well, I mean, kind of the biggest
12 public space in the neighborhood that people share
13 together are the streets. Those comprise the most
14 public space. But there are also -- and another one is
15 the parks. We've talked about the rookery earlier,
16 Eastlake, Westlake. Scattered throughout the
17 neighborhood, we have playgrounds. We try to have a
18 playground within a three minute walk of every house.

19 So there's one here. There's one over here.
20 And then there's one behind -- actually behind Mr.
21 Walbeck's lot right here. There's another one across
22 from Mrs. Adkins' house, or just down the street up
23 here. They are scattered throughout.

24 Then I talked about the linear parks. So all
25 the area around the lakes is available walk through and

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1 then --

2 Q. Let me stop you there: Those things you
3 described so far, who owns those?

4 A. Well, there -- the Town of Mount Pleasant,
5 when we built the roads and sidewalks, we contribute
6 those to the town, so they are public streets, so the
7 town owns them --

8 Q. Aside from the streets, the other things --

9 A. The Assembly owns most of the other ones.
10 There is some civic lots, like I mentioned, the East
11 Cooper Charter Montessori School is built right here.
12 They own that. That's on a civic lot. They own that.
13 The Church of the Holy Ascension is built here.

14 Q. Let me stop you for a second -- about the
15 Montessori School, did somebody buy that property?

16 A. No. We -- well, we donated the property to
17 the school, and then I think it was purchased by a
18 group of citizens who -- who subsequently built the
19 school and made it a charter school. We then
20 subsequently -- they wanted to expand the school, so we
21 sold them a site over here.

22 Q. Okay. We'll go through some more detailed
23 pictures, but while we're right here, why don't you at
24 least point out what is civic lot six, and show where
25 it is in relation to civic lot five?

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1 A. Civic lot 6 is where the Creek Club is and
2 civic lot 5 is right here. It's been referred to as
3 just the overflow parking lot, but that's not -- I
4 mean, we have a site right here at the end -- or at the
5 south end of civic lot 5. And we try to arrange all
6 the civic lots so that they will -- they are important
7 locations and they might terminate your view down the
8 street. For example, if you go down this street, and
9 you look right into the school. You come down this
10 street, and you look right into the Church the Holy
11 Ascension.

12 My church, we are building it right here. So as
13 soon as you come in off the roundabout, you'll see it
14 right here. This civic lot, you come in, and it
15 would -- you would see that. It's a prominence of the
16 space.

17 It's like when you go down -- you go outside of
18 the courthouse here, and you look to the left on Broad
19 Street, you see the old Exchange Building. It's just a
20 beautiful, memorable building, so it's the same kind of
21 principle.

22 Q. Okay. Thank you. I'm going to go through
23 quickly some pictures of the public spaces, and let's
24 start with Defendant's 169 please, Lea Ann -- and not
25 all of the public spaces, but some of them have been

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1 identified. Can you point to us -- show us at least
2 some of the public space here, please?

3 A. Well, the most obvious significant one is what
4 we talked about, this Eastlake. And Mr. Clem lives
5 right up here, and I think the Bedells live up here
6 too. There's -- on the south side of the lake and the
7 west side of the lake, there's a street between the
8 houses and the lake. There's also a sidewalk path
9 along there. But it's much like the battery, you know,
10 with the houses that overlook the battery.

11 Then on this side, the east side and the north
12 side, there's just a pedestrian path, so the homes
13 overlook that pedestrian path to the lake, just like
14 they do on the Marshwalk. There's a boathouse here.
15 There's -- just off the map right here is a big soccer
16 field. These are --

17 Q. And, Vince, tell me who owns the paths, the
18 boathouse, the soccer fields?

19 A. The Assembly owns all those. There's -- we
20 built these two canals that connect the two lakes and
21 there's -- there's pathways along those. We have --
22 some of those like -- maybe a portion of these, we have
23 not yet contributed to the Assembly yet. Because what
24 we want to do, there are still houses being built right
25 here, and we don't like to convey before -- if it's in

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1 a situation where the houses would interrupt with the
2 -- that area, so we hold that back and then fix it up
3 and then donate it to the Assembly.

4 On the Westlake, you see in the distance,
5 there's an amphitheater. I think you see the picture
6 of that. There's a boat ramp, the Westlake right
7 there. I'm probably missing some things.

8 Q. That's okay. Let's look at Defendant's
9 Exhibit 151, please, Lea Ann. Can you see that, Vince?
10 Take your time.

11 A. I do, yes.

12 Q. And what is Defendant's 151?

13 A. Well, that's a park at the southwest corner of
14 Westlake.

15 Q. On the Westlake. Okay. And what's it called?

16 A. Well, it's called Avant (ph) Garden.

17 Q. Okay. And is there -- do you see a little
18 marker -- I'm going to make you do this -- do you see a
19 little marker towards the water there; can you point
20 that out?

21 A. Yeah, somewhere right in there.

22 Q. You can blow that up, Lee Ann, that's fine.
23 That marker there, now was this -- is this owned by the
24 residents, the Avant Garden?

25 A. It is, yeah, by the Assembly.

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1 Q. Okay. And did the Assembly residents dedicate
2 this park?

3 A. They did.

4 Q. Come on, tell me what happened?

5 A. Well, they -- a group of residents in
6 appreciation for work I've done, in getting the
7 neighborhood started, and being involved in that with
8 my dad and brother, and literally hundreds if not
9 thousands of other neighborhood building participants,
10 they recognized me on this plaque.

11 Q. Okay. Let's look at Defendant's 172, please
12 ma'am. And I believe you referenced this one earlier.
13 What is this picture of, Mr. Graham?

14 A. This is a picture of a little playground that
15 has been named -- we haven't named all the parks, but
16 this one was named the Ramble, and this is behind Mr.
17 Walbeck's lot. It's kind of a mid block playground, so
18 it's -- everyone -- it's like a community backyard, and
19 it's accessible by the whole neighbor. You walk down
20 the lanes to get to it, but it's just behind all those
21 houses.

22 Q. Let's look briefly at Defendant's 165, please,
23 Lea Ann. And I believe you mentioned this from a
24 further view, but can you tell us what's shown in 165?

25 A. Well, this is looking over Westlake to, I

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1 guess, the west northwest. And this is the boat ramp
2 I've mention that goes into Westlake. You see in the
3 foreground, this is the walk that goes along the front
4 of these houses. There's another one over here and
5 this is the amphitheater. We call it the Mount
6 Pleasant Amphitheater, and it's a place where concerts
7 are held and things.

8 Q. Okay. Now, what I want to do is, there's been
9 a lot of talk about civic lots. I want to show what
10 some of the civic lots are. So let's look now, please,
11 at Defendant's 14, Lea Ann. Can you tell us what's
12 shown in 14, Vince?

13 A. Well, in the foreground here, this is the swim
14 and tennis club, the I'On Club, and this is a
15 clubhouse; another one. It's part of it. You see a
16 pool here. There's another pool here. There's a
17 little kiddie pool here. This is a lawn and this is
18 actually the first phase of the school that I
19 mentioned. That's -- it's under construction, so this
20 is years ago.

21 Q. That's a separate civic lot?

22 A. It is, yes.

23 Q. Were either of the civic lots shown here ever
24 owned by the homeowners association?

25 A. No.

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1 Q. Okay. Let's look at Defendant's 15 please,
2 Lea Ann. What does this show us, Vince?

3 A. Well, this shows the front of the school. I
4 mentioned how, you know, we like to locate civic
5 buildings at the end of the street, so this is looking
6 down at Civitas Street at the building.

7 Q. Does the Assembly own this civic lot?

8 A. No.

9 Q. Now, Lea Ann, let's please go to Defendant's
10 17, followed briefly by 18. What civic lot is
11 represented here, Mr. Graham?

12 A. I think this is CV-7. It's at the corner of
13 Shelmore -- or at the intersection of Shelmore and
14 Sowell Street. This is the foundation of the Church of
15 the Holy Ascension under construction several years
16 ago.

17 Q. Okay. Lea Ann, let's see 18, please. Vince,
18 is that the church?

19 A. Yeah. This is this completed church, the same
20 lot. Yeah, just from a different angle.

21 Q. Has that been owned by the Assembly?

22 A. No.

23 Q. Let's look at Defendant's 19, please. Do you
24 see a civic lot shown on Defendant's 19, Vince?

25 A. Well, this is CV-1. This is where we're

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1 building right now the new church for Holy Cross, my
2 church. And, again, I mentioned how we like -- this is
3 the roundabout -- it's actually the first modern
4 roundabout built on the South Carolina DOT highway.
5 And you come off the roundabout looking straight in,
6 and you'll look right at that church.

7 Q. Is that lot owned by the Assembly?

8 A. No. And, you know, it's worth explaining that
9 we didn't -- it didn't make sense -- we didn't feel
10 like it made sense for the homeowners association to
11 own these kind of civic lots with these buildings.
12 They had enough to say grace over just by managing the
13 landscaping, rather than having buildings --
14 particularly when some people would use it, some people
15 might be a member of the church or kids that went to
16 the school, or a member of the club; and then others
17 didn't want it -- didn't want to use it.

18 They didn't -- only like eight or ten percent of
19 the people in I'On even have boats, so that's why we
20 would tend to privatize these things, have them -- have
21 them managed by an entity. It's not any different than
22 like Hibernian Hall up here. It's is a private, civic
23 use. I mean, we all own this courthouse, right, all of
24 us, citizens of Charleston County; but that's a private
25 club. It's maintained by its members.

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1 Q. Lea Ann, how about Defendant's Exhibit 167,
2 please. Do you see a civic lot here, Vince?

3 A. Yep. This is CV-6.

4 Q. Does the homeowners association, the Assembly,
5 has it ever owned this property?

6 A. Well, I understand they own it now.

7 Q. Okay. How about did you ever intend to deed
8 it over to them from the I'On Company for free?

9 A. Never, absolutely not.

10 Q. Now, Vince, you can have a seat. I'll let you
11 rest. But I do want to draw some more things out of
12 you, which are generally tell me has the concept in the
13 development of I'On been well received in your opinion?

14 A. Well, you know, certainly not by everybody,
15 but for a lot of people, I think they really like it.

16 Q. Tell me about some of the recognitions that
17 the I'On Company has received?

18 A. Well, we've gotten, you know, we got a lot of
19 local and state recognition from the American Institute
20 of Architects, and from the Department of Natural
21 Resources for environmental stewardship; from a
22 national organization called -- or actually
23 international called The Congress for the New Urbanism.
24 It's given a charter award.

25 It's received attention in the Wall Street

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1 Journal and Southern Living, and all these different --
2 there have been two Coastal Living houses that -- model
3 houses -- their model houses, including the first one
4 that they ever did, was actually my brother, Geoff's,
5 house. So it's gotten a lot of attention in the press
6 and received awards.

7 And we host -- you know, we host a group of
8 students from different colleges. For example, Clemson
9 comes every year and we host them. We've hosted groups
10 of the mayors -- National Mayors Institute of Design
11 have been there, governors have been there.

12 We've had developers from as far away as
13 Australia and New Zealand, Japan, Europe. We like to
14 host groups like that because we're excited about, not
15 only the neighborhood, but the whole concept. And this
16 new urbanism movement that's -- that's kind of an --
17 it's a movement to explore these older ways of building
18 neighborhoods. It's an international movement, and
19 I'On is one of the -- one of the -- the built model
20 that people feel that -- that it's a good example of
21 it, so we host groups who come and see it. And we're
22 happy to do that and share it with others.

23 Q. Thank you. Does the I'On Company still own
24 lots, parcels in the development?

25 A. We own two lots, two -- well, we own two

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1 residential lots. And then my father and brother and I
2 own civic lot -- or two or three civic lots together
3 and then -- yeah.

4 Q. Does the company monitor the values of the
5 property in I'On?

6 A. We do.

7 Q. Okay. And there's been some discussion about
8 decrease in values for particular lots in this case; do
9 you recall hearing that?

10 A. I do, yes.

11 Q. From 2000 to now, can you give me an
12 understanding of the value of -- a median lot value in
13 I'On, whether it's gone up or down from 2000 to now?

14 A. It's gone up conservatively 400 percent, maybe
15 in some cases 500 or 600 percent.

16 Q. Hundred?

17 A. Hundred, yeah.

18 Q. All right. How about since, let's say 2003,
19 when Ms. Adkins purchased, would there have been a
20 similar increase?

21 A. Well, not that much, but it's -- it's probably
22 been around a 100 percent I'd guess.

23 Q. Okay. And how about from the time of 2009,
24 when the I'On Club sold civic lot 6 to 148 Civitas, are
25 the values higher now than they were in 2009?

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1 A. They are about 15 percent higher.

2 Q. Let's switch gears a little bit. Let's put up
3 Defendant's Exhibit 187, please, ma'am.

4 A. I want to say, too, that it's -- I think a big
5 part of that is simply a function of supply and demand.
6 You know, there's evidently a big demand for this type
7 of neighborhood. Again, it's not for everybody, but
8 there's a limited supply, so that -- that just -- we
9 have that, a big demand for something and a limited
10 supply, and the price goes up.

11 I think it's also a function of just the concept
12 of I'On that Ms. Hussey, again, described yesterday.
13 That if you're -- if what you offer is a sense of
14 inclusiveness and belonging and community, then every
15 time a house gets built, it fulfills the vision of what
16 you're trying to do, and it gets better --
17 theoretically, it gets better and it's more complete
18 and more fulfilled.

19 And it's interesting, you know, I used to work
20 for this developer who was developing this gated
21 community in Beaufort. And they -- their -- there, it
22 was gated and they were promoting exclusivity and
23 privacy. And what happened there, we noticed over
24 time, is that -- when -- you know, people that moved in
25 originally, sometimes resented newcomers, right,

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1 because it took away from their privacy and
2 exclusivity. And you say -- you'd hear people say, oh,
3 this place used to be nice until all these people moved
4 here.

5 And, again, back toward the concept of this
6 exclusiveness, if -- if, you know, we want to offer a
7 place that -- that -- that you -- that gets better over
8 time, that you look forward to your neighbor building
9 next to you. And, again, I know it's radical in this
10 age when we try to separate people, and divide people,
11 but this is -- this was kind of the idealistic vision
12 of the neighborhood.

13 Q. Was it more radical in 1995?

14 A. Much more radical in '95, but you can see it
15 now, it's more accepted and people more believe -- it
16 was more tough then.

17 Q. Thank you. Let's look at 107 at the top,
18 please, Lea Ann. These are -- this is 5th Annual
19 Meeting for the I'On Assembly, December 3, 2003; do you
20 see that, Vince?

21 A. I do.

22 Q. Okay. You are the chairman at that time,
23 aren't you?

24 A. Yes.

25 Q. Now, there are a number of Board members

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1 listed here. Okay. See in particular Andy Gowder,
2 Gaye Joyner, Libby Eble --

3 A. Joe Halford, Allen Coleman, Michael Percell.

4 Q. Right. Okay. Now, how many of the people on
5 this list worked for the I'On Company?

6 A. Well, I mean, in addition to myself, I
7 actually worked for the I'On Group, I think at this
8 time -- by this time, Allen Coleman worked for me. He
9 was -- he was project manager, a position that Chad
10 holds now.

11 Q. Everyone else was a resident?

12 A. That's right.

13 Q. Now, did you -- did you or the I'On Company
14 appoint these residents as members of the Board at this
15 time?

16 A. I'd have to look back. I think we appointed
17 some of them, two or three. And then the other ones
18 were elected. The way that worked, as we sold property
19 and it's laid out pretty clearly in the declaration of
20 covenants and restrictions, the more lots are sold and
21 property owners, the more representation they have to
22 elect people. And we -- we accelerate it. My dad
23 explained that yesterday or the day before, we
24 accelerated that to -- to enable more people to be --
25 to be voted and put on there.

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1 Q. Okay. Well, the way the votes would work, did
2 anybody that worked for the I'On Company or the I'On
3 Group have any vote that was more valuable than any of
4 the other members?

5 A. No.

6 Q. Okay. Let's turn to the second page, please,
7 Lea Ann, to the top, the finance committee. Okay. Do
8 you see who is represented at the finance committee?

9 A. Yes.

10 Q. Tell us who they are?

11 A. Well, it's Ms. Eble, Libby Eble; and then it's
12 Anne Bonk, Ed Clem, Andy Gowder and Joe Halford. Ms.
13 Eble, by the way, you heard testimony from her husband,
14 Tim. That's his wife.

15 Q. Right now who if any on that list worked for
16 the I'On Company or I'On Group?

17 A. No one.

18 Q. Let's look at Defendant's 125, please, Lea
19 Ann. Let's look at the top of this, please. The date
20 of the Assembly minutes; do you see that, Vince?

21 A. I do. May 18, 2007.

22 Q. Okay. And if you turn to the second page --
23 well, let's -- I'm sorry. But go back one, and just at
24 the bottom, do you see the I'On Company updates?

25 A. I do, yes.

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1 Q. And is that referring to the Planned Unit
2 Development Amendment?

3 A. Yes, it is.

4 Q. Okay. And so as early as May 18, 2007, this
5 was being addressed with the Board, the proposal for
6 phase XI; is that right?

7 A. That's right.

8 Q. And on the second page, please, Lea Ann, about
9 three quarters to the bottom, do you see that the
10 donations schedule is already laid out, the same way
11 here?

12 A. Yeah, right above it. It's \$700,000 to the
13 Assembly, \$700,000 to the trust, \$700,000 split evenly
14 between the community -- churches. \$700,000 for the
15 school and \$200,000 for the design and construction of
16 the roundabout.

17 Q. Okay. And on the last page please, Lea Ann,
18 can you tell me if it indicates that, Vince, who is the
19 chairman of the finance committee at this time, in May
20 of 2007?

21 A. Ed Clem.

22 Q. Who we saw earlier today?

23 A. Yes.

24 Q. Let's look at Defendant's 127, please. Let's
25 briefly look at the top so we can get the date.

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1 A. August 22, 2007.

2 Q. Okay. And, Vince, if you just check at the
3 bottom, do you see it's -- the Board is addressing the
4 P. D. Amendment proposal?

5 A. I do.

6 Q. And the next page, toward the bottom,
7 highlight the bottom paragraph. And, in fact, it
8 involves the Creek Club Sale Proposal; do you see that?

9 A. I do, yes.

10 Q. Okay. Next page, please, Lea Ann. Please
11 highlight the top two sentences for the Creek Club
12 Boating Facility area. Okay. Is -- tell me what Chad
13 is advising people of the -- or is discussing, at
14 least, in August of 2007?

15 A. Well, he's saying that -- that the boating
16 ramp is available to everyone who lives in the I'On
17 Assembly and also those members of the Club, both
18 members and nonmembers of the Assembly. And it's open
19 to the Olde Park residents, who are a member of the
20 I'On Club. And this is just the annual fee to get a
21 key and have decals for their boats. There's not a
22 charge to walk out on the docks, but it's just to be
23 able to access the boat ramp with your boat.

24 Q. Were y'all hiding the fact that Olde Park
25 residents could be members of the Club?

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1 A. No.

2 Q. Now, we touched a bit on when the sort of
3 process of your development, that there -- you ran into
4 some challenges to the zoning part of it, you had to go
5 up to the Supreme Court; do you recall that testimony?

6 A. Yes.

7 Q. Okay. Do you recall whether -- whether Ms.
8 Adkins -- are you aware of whether Ms. Adkins signed a
9 petition against the first proposal that I'On had made?

10 A. I'm not aware.

11 Q. Okay. You mentioned that you talked about
12 primary leaders in opposition, who would you describe
13 as the leader of the opposition?

14 A. Well, Steve Brock was one. He wrote the very
15 first letter of opposition back in 1995. There was
16 some other folks who -- two or three others who lived
17 in the adjacent neighborhood, Hobcaw Point, as did Mr.
18 Brock, who at that time lived in -- ironically a
19 condominium in Hobcaw Point. But I would say those
20 were -- he was -- he was certainly the leader at that
21 point.

22 Q. Now, why do you say ironically?

23 A. Well, because he was against the -- one of the
24 things that this group was opposing was the multifamily
25 unit that I mentioned earlier, this ability to have

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1 condominiums and apartments in the neighborhood.

2 Q. Okay. Now, did you and the I'On Company
3 monitor the letters that were being written, that
4 related to the challenge to your development?

5 A. Well, we did. I mean, there was -- I mean, on
6 the positive side for us any way, we had a huge
7 outpouring of support from that neighborhood, and the
8 surrounding neighbors, and other people in Mount
9 Pleasant. Because the Town of Mount Pleasant had a few
10 years earlier, adopted kind of their own vision, a
11 master plan that described how they -- a traditional
12 neighborhoods, and how that those would be -- they --
13 they were enthusiastic about those and encouraging
14 those to be developed, and they actually named the site
15 that I'On is now on as a prime site for that to be
16 built.

17 Q. Okay. I'm going to ask you to look at what's
18 been marked for identification only as Defendant's 106.

19 A. Okay.

20 Q. Okay. Do you have 106 in front of you?

21 A. I do.

22 Q. And is it a collection of materials -- tell me
23 what 106 is?

24 A. Well, this is a collection of materials from
25 back -- from 1995, and all the way up into 1997, when

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1 we were proposing the neighborhood and trying to seek
2 rezoning. And these are opposition -- some of the --
3 some of the opposition letters that were written.

4 Q. Okay.

5 MR. DUFFY: I would like to move in -- into
6 evidence Defendant's 106.

7 MR. LUCEY: Object to hearsay, Your Honor.

8 MR. DUFFY: It's not being offered for the truth,
9 I promise you.

10 THE COURT: All right. Let me take a look at it,
11 and I will rule on it after I've had a chance to review
12 them. Can you keep going while I take a look at this?

13 MR. DUFFY: Sure.

14 THE COURT: Or do we need to stop?

15 BY MR. DUFFY:

16 Q. Vince, I don't want to go through the detail
17 of every challenge, but can you tell me, from the
18 beginning, a number of things that have drawn
19 opposition as to what I've proposed to do?

20 A. Well, I mean in the big picture, it was
21 just -- it was opposition of this concept -- of this
22 traditional walking neighborhood concept because it was
23 different. And some of the things that were objected
24 to were the mix of uses. There was concern that if you
25 had multifamily or apartments, you know, undesirables

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1 would move in, which we thought was crazy. Everybody's
2 lived in an apartment, but that would somehow devalue
3 the surrounding property values. There was concerns
4 that were expressed, these commercial -- these small
5 commercial --

6 Q. And I don't mean to interrupt you, but I do
7 want to talk about some other things beyond just the
8 vision and the initial opposition. There were
9 specific -- were there specific proposals that the I'On
10 Company had made to the Town, or whatever else, that
11 had gotten -- drawn opposition?

12 A. Well, I mean, there's specific -- I'm not sure
13 exactly what you mean, but there were designs for like
14 the streets. We wanted to do the narrow streets. And,
15 you know, there was some concern about what -- would
16 emergency equipment be able to use those.

17 Q. Okay. Where there -- did you ever propose
18 having another connection to the Braemore?

19 A. Well, that came subsequently to getting
20 approval --

21 Q. Right. That's what I'm driving at. After the
22 approval --

23 A. Yeah, after we got approved -- after the, you
24 know, the Supreme Court decision had been -- rendered
25 their decision, we had been all the way through that.

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1 Will we still -- we continued to get opposition. Like
2 for example, Mr. Brock, Ms. Adkins' companion, we --
3 there was a new neighborhood being proposed adjacent to
4 I'On, called Braemore, at the southwestern corner of
5 the neighborhood. And we wanted to work with the
6 developers to connect, to have a street that connected
7 right there, and Mr. Brock objected to that.

8 He went to the Town Council and went to the
9 planning commission -- I don't know if he went to Town
10 Council, but he certainly went to the planning
11 commission and tried to oppose that connection.

12 Q. Okay. And at some point, did you have a
13 proposal about allowing attached dwelling units?

14 A. We did.

15 Q. And tell me, what are attached dwelling units
16 and what was the proposal?

17 A. Well, attached dwelling units as opposed to a
18 single family detached -- I guess, a great example
19 would be Rainbow Row. You have townhouses that are
20 attached to one another. They're single family houses,
21 but they are attached. And so we thought that -- that
22 a lot of people wanted -- you know, prefer -- not
23 everybody again, but some people prefer that because
24 it's less maintenance and not a big yard and
25 everything. So we wanted to convert some of the

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1 approved houses from single -- not add to the number,
2 but convert some from single family detached to
3 attached. And we got, again, opposition from Mr. Brock
4 on that, as well as some others.

5 Q. Okay. Now, was there any issue with the idea
6 of having the Montessori School in I'On?

7 A. Oh yeah. We were -- unfortunately after we
8 had gotten -- this is a little background --
9 unfortunately, after we had gotten approved and the --
10 all of the council members who had voted to support
11 I'On, the six council members who were targeted for
12 removal by the opposition.

13 And over the subsequent election cycles, all six
14 of those -- well, five of them were voted out of office
15 and the sixth was -- was -- didn't run again. So we
16 were -- what we were dealing with in the early part
17 of -- many years for the early part of I'On's
18 development, was kind of a hostile council, who owned
19 their allegiance to these opponents who opposed it.

20 And one of the things we were doing, we wanted
21 to have a school in the neighborhood, so we had a
22 school that was interested, ultimately the Montessori
23 School, and they proposed to build the school on the
24 civic lot. And the planning -- head of the planning
25 department in Mount Pleasant at the time, wasn't clear

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1 if they -- if the school could be built on one of these
2 civic lots. And so he -- he put it to the Board of
3 Zoning Appeals at the time, and they voted -- they said
4 the school is not a civic use.

5 So we challenged that. We said, well, what is a
6 school if not a civic use, so we challenged that. And
7 it -- it was heard by -- in circuit court, like this
8 one, but Judge Vic Rawl. And he voted -- or he
9 rendered a decision that said, yes, a school -- the
10 town cannot exclude a school from its definition of
11 civic use; at which point, the town appealed that
12 decision. And so it went to the Court of Appeals, but
13 that was an example. And so ultimately -- and the
14 Court of Appeals ruled to affirm Judge Rawl's decision.

15 Q. Okay. How about a proposal to relocate the
16 entrance to the I'On Club?

17 A. Well, yeah, that was -- happened more
18 recently. I can show you on the screen, but there are
19 three -- there are three vehicular connections to
20 Mathis Ferry Road. We wanted to build a fourth,
21 outside the I'On Club on Mathis Ferry Road, and Mr.
22 Brock, and I believe Ms. Adkins, were -- opposed that.

23 Q. Okay. And certainly you were aware in 2009,
24 there was a challenge to the zoning, the use of the
25 Creek Club?

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1 A. Right. We've talked about that.

2 Q. And in 2011, you were served with this suit;
3 is that right?

4 A. I guess so.

5 Q. Okay. Are you aware of anyone challenging
6 the -- the community access or not -- basically the
7 fact that the pavilion dock was a community waterfront
8 recreation facility?

9 A. Anyone challenging that it was?

10 Q. Yeah.

11 A. No.

12 Q. Who is Chuck Hill, and tell me what was
13 developed with his property?

14 A. Chuck Hill, I believe, is a resident. He
15 lives in a home on Ponsbury Road that backs up to the
16 swim and tennis club. There is a little lane -- a
17 lane -- a little alley that runs behind his house, and
18 it's on a fairly small lot. And he wanted to just
19 purchase from the Club a small parking space, to be
20 able to park another car there or a boat; I'm not sure
21 what. But it had to be -- that had to go before the
22 town planning commission. All these things -- it's a
23 lot of -- you have to go through these approval
24 processes, but he had to do that, and Mr. Brock opposed
25 that. I don't think he still -- hasn't been able to

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1 get his parking space.

2 Q. Okay.

3 A. It's pretty benign. It wouldn't have affected
4 anybody else.

5 MR. DUFFY: Your Honor, returning to the exhibit,
6 have you had a chance to look at it?

7 THE COURT: I have reviewed the exhibit, and I'm
8 not going to allow the exhibit into evidence. I think
9 that Mr. Graham has testified about the opposition, and
10 it's cumulative to the extent that it's not hearsay.

11 MR. DUFFY: Thank you.

12 THE COURT: You're welcome.

13 BY MR. DUFFY:

14 Q. Let's look at Defendant's 150, please, Lea
15 Ann, pages three and four. Do you have that in front
16 of you, Vince?

17 A. Did you want me to talk about the accessory --
18 accessory dwelling units?

19 Q. Yes. I think we've gotten the picture.

20 A. All right, 150.

21 Q. Okay. Are you on page three?

22 A. Okay.

23 Q. All right. And do you see an e-mail from Ms.
24 Adkins -- could you highlight this please -- do you see
25 the unit -- do you understand who Ms. McGinn is?

V. GRAHAM -- DIRECT BY MR. DUFFY

1 A. I don't.

2 Q. Okay. Do you understand that this is a --
3 well, let's go to the first page, please. All right.
4 Do you see -- and who is the e-mail from at the top?

5 A. It is from Chad to Ken Prausc, who works for
6 the Town of Mt. Pleasant.

7 Q. And what is the subject line?

8 A. Driveway connection at I'On Club.

9 Q. Okay. And the date is?

10 A. March 23, 2010.

11 Q. Okay. And who is Mr. Prausc?

12 A. He's a planner with the Town of Mount
13 Pleasant. He's on the staff, planning staff.

14 Q. Okay. Let's highlight Chad's e-mail, please.
15 Okay. Do you see when he says, "thanks for the
16 e-mails", does that indicate to you Mr. Prausc is
17 forwarding e-mails in this subject to Mr. Besenfelder?

18 A. It does, yes.

19 Q. Okay. And there are complaints, which Mr.
20 Besenfelder at least understands is the same few
21 people; do you see that?

22 A. I do.

23 Q. Okay. Let's look to page three, please. All
24 right. Now, do you see one of the forwarded messages
25 is from Ms. Adkins?

V. GRAHAM -- DIRECT BY MR. DUFFY

1 A. I do.

2 Q. Okay. Let's look at the next page, the
3 substance of Ms. Adkins' e-mail, starting here, to the
4 bottom. All the way down -- well, that doesn't help
5 you -- okay. Now, do you see that Ms. Adkins is
6 forwarding -- tell me, you take a minute to read it, so
7 I won't put words in your mouth. Take a minute to read
8 it, please.

9 (Pause.)

10 A. I have read it.

11 Q. Okay. And do you understand this to relate to
12 the fourth entrance at I'On?

13 A. The fourth entrance on Mathis Ferry Road to
14 I'On.

15 Q. And do you understand Ms. Adkins to be
16 forwarding minutes from a public hearing in November of
17 2009 -- do you see that?

18 A. Yes.

19 Q. Okay. Now, let's go back, Lea Ann, to show
20 what was forwarded about -- from the minutes. I'm
21 sorry. Lea Ann, the same page, just down. Now, who is
22 it that she is indicating spoke before the commission
23 against the I'On proposal?

24 A. Well, her companion, Steve Brock; herself, and
25 then Ward Mundy.

V. GRAHAM -- DIRECT BY MR. DUFFY

1 Q. Okay. Thank you. Let's look at Defendant's
2 105, please, Lea Ann. Let's just look at the top here.
3 Vince, do you recognize this e-mail?

4 A. I do.

5 Q. Do you have an understanding as to why the
6 1998 Property Report became an issue so much later?

7 A. Well, I do. It was part of this scheme that
8 was laid out at that time.

9 Q. That's reflected in 105?

10 A. Yes.

11 MR. DUFFY: Thank you, Vince.

12 THE COURT: Okay. Does anybody need a break
13 before we go into cross-examination -- okay. Let's
14 take about a 10 minute break. Everybody stretch,
15 including you, Mr. Graham. If you need to, get some
16 water. Then we will be back in 10 minutes. We will be
17 at ease. Thank you.

18 (WHEREUPON, a brief recess was taken.)

19 (WHEREUPON, the jury leaves the courtroom at
20 2:57 p.m.)

21 THE COURT: All right. Is everybody ready for the
22 jury? (Pause.) All right. Everybody ready for the
23 jury. Thank you. Yes, sir.

24 (WHEREUPON, the jury enters the courtroom at
25 approximately 3:07 p.m.)

V. GRAHAM -- CROSS BY MR. LUCEY

1 THE BAILIFF: All jurors are present, Your Honor.

2 THE COURT: All right, sir. Thank you, sir.

3 Thank you, ladies and gentlemen. We are ready for
4 cross-examination. Mr. Lucey.

5 MR. LUCEY: May it please the court.

6 CROSS EXAMINATION BY MR. LUCEY:

7 Q. Mr. Graham, I believe I heard you open your
8 testimony by telling the jury that you had always
9 planned -- originally, you had always planned to build
10 that community dock at the Creek Club parcel; is that
11 correct?

12 A. Well, I described our vision for multiple
13 community docks.

14 Q. I'm sorry?

15 A. It included -- it included the one at the
16 Creek Club, yes.

17 Q. Okay. I'm going to try to keep it simple.

18 A. Got you.

19 Q. I'm talking about the community dock at the
20 Creek Club; you with me?

21 A. Yeah. There were a couple of docks there and
22 that was part of the plans, yes.

23 Q. And you always planned on building that
24 community dock at the Creek Club, correct?

25 A. Not that particular one, but we had plans for

V. GRAHAM -- CROSS BY MR. LUCEY

1 docks there, yes.

2 Q. And I further -- I think I heard you tell the
3 jury early in your testimony, that originally you
4 planned on conveying the community dock that would be
5 built at the Creek Club to the homeowners, correct?

6 A. Originally we did, yes.

7 Q. Well, tell us when that changed.

8 A. Well, also I think I have said already, the
9 plans -- as the plans evolved and we got the I'On Club,
10 the swim and tennis and Creek Club and -- and we bought
11 the property, and got the docks approved, sometime in
12 that area is when it evolved to do that.

13 Q. Exactly. And that's my question, sir, when?
14 When did the change occur?

15 A. Well, I mean, we envisioned in, Mr. Lucey, as
16 you know -- I mean I was having conversations with and
17 made proposals to the developers of Olde Park. And
18 that was in '99 or '98 -- late '98, early '99.

19 Q. Okay. So you are associating the change with
20 Olde Park, if I am hearing you correct; is that
21 correct?

22 A. Well, not the only change. I mean, as I've
23 testified earlier, we had this plan for all these
24 multiple docks, including the docks at the Creek Club.

25 Q. Are you associating at least one reason for

V. GRAHAM -- CROSS BY MR. LUCEY

1 the change with the Olde Park negotiation or deal?

2 A. No. No. Because we had planned to do a swim
3 and tennis club and build the Creek Club down there,
4 which would be part of the swim and tennis club, which
5 would have those boating facilities.

6 Q. So you are not associating the change with
7 anything having to do with Olde Park?

8 A. I mean, no. You're right. We had planned
9 that all along, as I said.

10 Q. Well, I'm going to work with you -- let me
11 have Plaintiff's 5 on the screen, please. Sir, do you
12 see Plaintiff's 5, the dock -- dock number one plan
13 from the State and Federal applications on the screen?

14 A. Yes, sir.

15 Q. And if we go back down, please, and blow up
16 the date on that sheet. So this plan is dated August
17 10, 1999; do you see that?

18 A. I do.

19 Q. Okay. Using this plan as a chronological
20 marker, did your change occur before or after this
21 plan?

22 A. The change to the -- to what exactly?

23 Q. The only change you and I have been discussing
24 for the last couple minutes, sir.

25 A. The changing from the conveying it to the

V. GRAHAM -- CROSS BY MR. LUCEY

1 Assembly to changing it to the Club?

2 Q. Yes, sir.

3 A. I mean, no. I would have envisioned we --
4 this would be part of the Club before that, but I have
5 to go -- there's a bunch of dates in here, so I'd have
6 to look at the other documentation -- you're asking me
7 exactly when we made that change? I'm not --

8 Q. I'm just asking you, sir -- I apologize if I
9 was unclear. I was asking you if the change occurred
10 before or after Plaintiff's Exhibit No. 5, on the
11 screen, which is dated August 10, 1999?

12 A. I don't recall without looking at other
13 documentation.

14 Q. You don't know one way or the other?

15 A. If I look at the other documentation, I can
16 tell you precisely. But as I said earlier, the
17 original plan was to convey these docks to the
18 Assembly, and then changed when we started developing
19 the Club -- when we started planning the swim and
20 tennis club and the other facilities. We got more into
21 it.

22 Q. Well, I'm going to show you the other
23 documents, and we have been trying to nail down those
24 dates, sir. It's Plaintiff's Exhibit 86. It is the
25 I'On Club's -- excuse me -- the I'On Company's

V. GRAHAM -- CROSS BY MR. LUCEY

1 application for a dock permit. And attached to it, is
2 joint and federal application signed by your brother,
3 Geoffrey Graham, and your agent, NewKirk Environmental,
4 correct?

5 A. I see Ken Hance's, of Newkirk Environmental,
6 signature. Yeah, Geoff's is on page three.

7 Q. And the cover letter is October -- excuse me
8 August 12, 1999, correct?

9 A. Yes.

10 Q. All right. And it's about a 20 page
11 application, correct?

12 A. It looks pretty thick.

13 Q. And it has all the drawings of all the docks
14 we looked at earlier?

15 A. It does.

16 Q. I didn't see anything in that 20 page document
17 that you were saying to the state and federal
18 governments, referencing the I'On Club being the owner
19 of the -- to be the owner of dock number one; did I
20 miss it?

21 A. I haven't been all the way through it. Do you
22 want me to go all the way through it?

23 Q. Sure.

24 A. Your question is, that you don't see anything
25 that shows that it's going to be part of the Club?

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. That the Club is going to have dock number
2 one, sir.

3 A. I think, Mr. Lucey, this is -- this shows all
4 the Club -- all the community docks that we were trying
5 to get permitted at the time.

6 Q. And the applicant was the I'On Company,
7 correct?

8 A. Probably. Signed by Geoff and using our --
9 and Ken Hance with Newkirk.

10 Q. The applicant is the I'On Club, correct --
11 excuse me, the I'On Company, correct, sir?

12 A. Yeah. That's right. Page two, I'On Company.

13 Q. And let's go to sheet four, please. Drawing
14 four -- drawing 414?

15 A. What page is that?

16 Q. It will be the -- those drawings there, sir,
17 and it will be the fourth sheet, so sheet four of 14, I
18 believe.

19 A. Okay.

20 Q. And the proposed activity in the bottom right
21 hand corner says "community waterfront recreation",
22 correct?

23 A. That's right.

24 Q. And every sheet following it says "community
25 waterfront recreation" in the exact same location,

V. GRAHAM -- CROSS BY MR. LUCEY

1 correct?

2 A. Looks like it. Nine of 14, ten of 14, yep.

3 Q. And there's no reference to the Club, is
4 there?

5 A. No. Not that I can see just skimming through
6 it like you're asking me to.

7 Q. And does that indicate to you that your
8 decision to have the boating facilities in the Club
9 instead of the Assembly probably postdated this
10 application to the state and federal government?

11 A. No.

12 Q. It doesn't indicate one way or the other?

13 A. No.

14 Q. Does it help you at all -- well, tell us when
15 the change occurred?

16 A. Well, that's what we were just trying to
17 determine. I mean, as I told you originally, there was
18 a vision that we would have this -- community docks
19 down there on Hobcaw Creek.

20 Q. Is there any document I could show you, sir,
21 or any document that you can think of, that would help
22 you tell the jury when the change occurred; when the
23 change occurred that the boating facilities, the
24 community dock would no longer be deeded to the
25 Assembly; it was intended to be deeded to the Club?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. I mean, there was references made that it was
2 owned by the Club in 2000, 1999.

3 Q. There's a deed February, 2000, correct?

4 A. I don't --

5 Q. I'm sorry. The deed is August, 2000, correct?

6 A. August 2000?

7 Q. August 15, 2000?

8 A. I mean, we'd have to go back and look. You
9 said February, August -- I know it's easy to get messed
10 up on the dates --

11 Q. We got Exhibit 42, it's the easement, dated
12 February 9th, 2000; and the deed to the company that
13 gave the easement, six months later, August 15th of
14 2000, Exhibit 11; correct?

15 A. Yes.

16 Q. So we know that the decision has been made, at
17 least by August 15, 2000, correct?

18 A. Yeah, probably -- probably before, well
19 before.

20 Q. And why do you say that, please?

21 A. Because you would have to come up with an idea
22 and then actually implement the idea.

23 Q. Okay. And does the easement existing -- or
24 the attempted easement, which was filed February 9,
25 2000, does that indicate your decision probably

V. GRAHAM -- CROSS BY MR. LUCEY

1 occurred before then?

2 A. Well, I mean probably.

3 Q. Okay. Let me have Plaintiff's Exhibit No. 1,
4 please, on the screen, page one. Sir, the Property
5 Report is on the screen, page one. It's dated November
6 3, 1998; do you see that?

7 A. I do.

8 Q. Now, can you tell the jury whether the
9 decision to change from conveying the community dock to
10 the Assembly, to instead conveying the community dock
11 to the Club occurred before or after the Property
12 Report, Plaintiff's Exhibit No. 1, that we see on the
13 screen?

14 A. Well, I mean, you can go to whatever your
15 exhibit is -- Exhibit 3, with the Impact Assessment,
16 where it talks about some of the facilities would be
17 owned by private clubs. And that's also mentioned, I
18 think, on the last page of this document. So it was --
19 it was -- the decision that it would be part of a
20 private club was made before this. That's what -- that
21 was what the thinking was at the time, you know. That
22 it would be -- it would always be owned -- that
23 facility down there, the Creek Club, would be owned by
24 the Club. The docks, I mean, at the time this was
25 done, again, we hadn't purchased this property. We had

V. GRAHAM -- CROSS BY MR. LUCEY

1 not applied for the permits. Again, there's -- there's
2 a huge difference, as you -- I'm sure you would
3 appreciate -- between actually -- vision and execution,
4 so...

5 Q. I'm going to repeat my question. I'm going to
6 try to make it even simpler this time. Are you able to
7 tell the jury whether the decision to change from
8 deeding the community dock to the Assembly, and instead
9 to convey the community dock to the Club, occurred
10 before or after Plaintiff's Exhibit No. 1, the Property
11 Report, which is dated November 3, 1998?

12 A. I would assume that it was -- the final
13 decision was made after.

14 Q. Okay. And so we've narrowed it down from
15 November 3, 1998, to before February 9th of the year
16 2000; is that correct?

17 A. That sounds about right, yeah.

18 Q. Okay. Let me have Plaintiff's Exhibit --
19 Plaintiff's Exhibit 191 on the screen, please, sir.
20 Sir, we see the letter from the I'On Company to the
21 Olde Park people, dated March of 1999 on the screen,
22 relating to the proposal for access, correct?

23 A. Yes.

24 Q. And if we look at the bottom of the screen,
25 first, we see your son's signature, sending the letter,

V. GRAHAM -- CROSS BY MR. LUCEY

1 correct?

2 A. No, that's my signature.

3 Q. I'm sorry. Mr. Graham, I apologize, you are
4 right. We see your signature?

5 A. It's easy to make mistakes, I understand.

6 Q. Yes, sir. And then we see that the letter is
7 now countersigned by Joe Griffith and Louis Griffith,
8 correct?

9 A. That's right.

10 Q. And, in fact, above the sincerely of your
11 name, we see a sentence saying "if these revisions are
12 acceptable to you, please indicate by your signature
13 below", correct?

14 A. Correct.

15 Q. And upon mutual agreement, the I'On Company
16 will have a more formal document prepared for
17 execution, correct?

18 A. That's correct.

19 Q. So they accepted that -- whatever the
20 revisions were, they accepted them by signing it and
21 transmitting this document back to you, correct?

22 A. Correct.

23 Q. And this is, as we said, March of 1999,
24 correct?

25 A. Yes. Well, I think. Is that what it was?

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. And can you tell the jury whether the decision
2 to change, to deed the docks to the Club instead of the
3 Assembly, occurred before or after this agreement dated
4 March 24, 1999?

5 A. Well, at this point, probably sometime before
6 because this was -- we were negotiating the park. We
7 talked about the lift station, but also access to the
8 Club. So at this point in time, the facilities were --
9 would be a part of the Club.

10 Q. Okay. So we've narrowed it down. The
11 decision to change, the decision to deed the docks to
12 the Club instead of the Assembly was made between
13 November 3, 1998, and March 24, 1999, correct?

14 A. It appears that way, yes.

15 Q. And you say it appears that way, and just a
16 moment ago you said it's probably that way, correct?

17 A. Yeah.

18 Q. And sitting here today, that's your best
19 belief, correct?

20 A. I mean, just seeing these documents the way
21 you presented it, yeah. It seems that way. I don't
22 know if there's other documents that would say -- I
23 mean, I'm not the only decision maker here, so -- as
24 best I can tell, I think that's accurate.

25 Q. So the decision is likely made between

V. GRAHAM -- CROSS BY MR. LUCEY

1 November 3, '98, and March 24, '99. All right. We'll
2 come back to that. Let's go to Plaintiff's Exhibit
3 189, please. So this is the proposal that you had
4 written to the Olde Park people, regarding the sewer
5 lifts or whatever, and the access to the community dock
6 and boat ramp, correct?

7 A. That's right.

8 Q. And this is essentially the start of the
9 written dialogue that we've seen in court between you
10 all on this -- on this topic, correct?

11 A. It appears to be. I don't know that there's
12 any letters before this, but yeah, it seems --

13 Q. And in the middle of the first page, the jury
14 has already seen that you've got a paragraph titled
15 "proposal"; and that you are providing this letter in
16 response to their request for a proposal for access to
17 certain things, including I'On's community dock and
18 boat ramp, correct?

19 A. That's right. That particular community dock.

20 Q. And on the next page, top paragraph, we see
21 you describe the facilities to Olde Park in just a
22 little more detail. And after talking about the pool,
23 and a couple of other things; and in the third line,
24 you say "and a 3600 square foot Creek Club located on
25 our waterfront park, fronting Hobcaw Creek" end quote,

V. GRAHAM -- CROSS BY MR. LUCEY

1 correct?

2 A. That's what that reads, yes.

3 Q. The Creek Club was, at that time, intended to
4 front a park on Hobcaw Creek, as you are writing in
5 your letter, correct?

6 A. Um, yeah.

7 Q. Okay. And you see those two words in the
8 letter says "waterfront park"?

9 A. I do.

10 Q. Was that waterfront park ever built?

11 A. Well, I mean, yeah. This has been described
12 before. There's a -- the walk along the water that
13 goes all the way along the waters and marshes of Hobcaw
14 Creek was built. And this was the -- this park that
15 was to be a perpetual -- it was to be a perpetual
16 access that provided access to those facilities.

17 Q. The waterfront park, fronting Hobcaw Creek,
18 was built; is that your testimony?

19 A. There was a path that was built there. I
20 consider that a park. There was also the 3600 square
21 foot Creek Club, as an example, that was what was
22 contemplated. Nothing that -- that it was built. But,
23 yeah, there was that -- there was that path along the
24 creek that we wanted everyone to have perpetual access
25 to because it provided the access to the docks down

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1 there.

2 Q. So you are telling us, there was a park built
3 between the Creek Club building and the deep water
4 Hobcaw Creek; is that correct?

5 A. There was a park contemplated at that time,
6 yes.

7 Q. I thought you just told us there was a path
8 built there that you're calling a park?

9 A. Yeah, you walk in front of it. Right, that's
10 been built.

11 Q. So your answer is yes, there was a park built
12 between the Creek Club and the deep water Hobcaw Creek;
13 is that correct?

14 A. Well, it's part of a park. It's part of a
15 park, this linear park system, yes --

16 Q. I'm --

17 A. It's not a separate park, it's part of the
18 park.

19 Q. I promise you, I'm going to get to your linear
20 park. I promise you.

21 A. Well, I'm just saying it's part of that --
22 it's like the -- I mean, the -- the -- the vision there
23 is for the whole -- every part of the access to --
24 every part of that, the marshes of Hobcaw Creek -- the
25 marshes and waters of Hobcaw Creek, to be provided to

V. GRAHAM -- CROSS BY MR. LUCEY

1 residents of I'On, and actually anyone else who would
2 behave in a civil manner to walk down there.

3 Q. We are going to get to the Marshwalk Park,
4 sir. We are focused on the waterfront park --

5 A. That is exactly what it says, you're right;
6 waterfront park.

7 Q. Okay. We are going to get to it. I'm
8 focusing on that waterfront park in your letter only.
9 Was that park, that the Creek Club was supposed to
10 front, on Hobcaw Creek built?

11 A. There is -- there is a -- yes. There is a --
12 something that ties into the Marshwalk and it can be
13 deemed a park, between the Hobcaw Creek and the Club.
14 You can deem that park, pathway, patch of lawn, that's
15 been built. And perhaps around -- actually that wraps
16 around and also fronts on what we now call -- it's
17 been -- everybody's agreed, that it's Shelmore Creek.

18 Q. You are telling the jury, there was a park --
19 whether you want to call it a linear park, or a pathway
20 park, or a passive park, or an active park, but you are
21 telling the jury there was a park built on CV-6 between
22 the Creek Club and the deep water Hobcaw Creek; is that
23 correct, sir?

24 A. We can pull it up, if you want, and show them
25 --

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. A yes or no will do fine.

2 A. -- a photograph --

3 THE COURT: Yes or no, please.

4 A. There's -- I mean, yes. That is -- can be
5 deemed a park right there in between the Creek Club and
6 the -- and the -- and the creek.

7 Q. And it was on CV-6?

8 A. That's correct.

9 Q. And it was sold to Vince Russo and 148 Civitas
10 on August 5, 2009, correct?

11 A. Mike Russo?

12 Q. Yes, sir.

13 A. CV-6 was, yes.

14 Q. Including the park you just told the jury was
15 built on that lot?

16 A. Well, that was part of the lot.

17 Q. And as you described that park, sir, on CV-6,
18 there can be no doubt that it was, in fact, Creekside,
19 correct?

20 A. It is along the creek, yes. But that's not
21 what was intended in the Property Report to be
22 Creekside Park; that's the Marshwalk.

23 Q. Defendant's 2 on the screen, please. Enlarge
24 the CV-6 area on the right hand corner. Yes, sir. Do
25 you have the pointer?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. I do. I've got one.

2 Q. Thank you, sir. I'm pointing at the very edge
3 of the Marshwalk, correct?

4 A. Yes.

5 Q. And that is the Marshwalk portion that is in
6 the deed that you and your attorney showed to the jury
7 an hour or so ago, correct?

8 A. Yeah. The Creekside Park, Marshwalk. I
9 actually think of the Marshwalk as extending across the
10 front of the CV-6, and maybe that's where we are having
11 trouble.

12 Q. So you sold part of the Marshwalk, too, didn't
13 you, sir?

14 A. We -- yeah, that was along CV-6, and it was
15 with -- with a perpetual easement.

16 Q. Now, in this same letter, Exhibit 189 please,
17 the second page, the second full paragraph, you go on
18 to say, "We will shortly apply for permits for a
19 community dock facility and renovation of the boat ramp
20 along Hobcaw Creek. These facilities will belong to
21 the I'On Assembly", correct?

22 A. That's right.

23 Q. And we just saw in Plaintiff's Exhibit 86 that
24 you did, in fact, proceed with applying for those
25 permits, correct?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. Yes.

2 Q. And we just saw dock number one, which has the
3 community dock on it that was described in this letter,
4 correct?

5 A. Yes.

6 Q. And, sir, while I'm on Olde Park, let's just
7 briefly go to Plaintiff's Exhibit 190, page two, first
8 paragraph, item number five. This is the letter from
9 Joe Griffith back to you in response to your request
10 for -- to your proposal, and item five he's confirming
11 that the deal will include a 3600 square feet Creek
12 Club, located on the waterfront park on Hobcaw Creek,
13 correct?

14 A. It says that's what the club facilities would
15 include, correct.

16 Q. And so this would indicate to us that by
17 February 19, 1999, it was substantially in place that
18 the community dock would be transferred to the Club
19 instead of the Assembly, correct?

20 A. Well, I mean, at this time, that's what's
21 contemplated, that these boating facilities are going
22 to be part of the club. And that the -- it was a
23 proposal to do -- to reach an agreement on this, for
24 the Olde Park residents to have access to the Club.
25 This describes what would be part of those club

V. GRAHAM -- CROSS BY MR. LUCEY

1 facilities. I think that's what you are asking, right?

2

3 Q. Yes, sir. And if we go to Plaintiff's Exhibit
4 117, we'll see a second almost identical copy of the
5 same letter on the screen, Plaintiff's 117. There's
6 some handwriting at the top, indicating that this
7 proposal needs to be faxed on to Geoff -- excuse me --
8 Joe, Tom and Geoff, correct?

9 A. Yes.

10 Q. And returned to me to reread, February 23,
11 correct?

12 A. That's right.

13 Q. Is that your handwriting, sir?

14 A. It looks like it.

15 Q. So you took -- you were the recipient, you
16 were the addressee in the February clarification letter
17 back with Joe Griffith, and you forwarded it on to Joe
18 Barnes, Tom Graham and Geoff, your brother, correct?

19 A. That's right.

20 Q. And there's a fax inscription on this letter,
21 correct?

22 A. Yes.

23 Q. It's dated February 23, 1999, 3:23 p.m. and it
24 reads Civitas, correct?

25 A. Yes.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. Now, Civitas -- I'm not sure if the jury has
2 fully heard this, Civitas is the original name of the
3 company known as...?

4 A. I'On Group.

5 Q. The I'On Group, LLC?

6 A. Correct.

7 Q. Your management company?

8 A. That's right.

9 Q. So we see that your management company is
10 involved in the Olde Park negotiation that's taking
11 place in February, 1999, correct?

12 A. Well, I mean, this is the -- Civitas is the
13 office. I had a different office from the I'On Company
14 this time. Joe Barnes -- I'm not sure if he was on
15 board as our general manager yet, but this looks like
16 it was -- I mean, I was not one of the members of the
17 I'On Company, so it was sent from our office which
18 looks like Civitas was just a separate office at this
19 time.

20 Q. And because Civitas or the I'On group, LLC had
21 a separate office from the I'On Company, you can't just
22 walk across the hall and hand it to everybody, it gets
23 faxed over, correct?

24 A. Yeah, that's what it looks like.

25 Q. So Civitas received the Olde Park counter, and

V. GRAHAM -- CROSS BY MR. LUCEY

1 Civitas sent the Olde Park counter on to the I'On
2 Company?

3 A. Well, if you could go to the image, the larger
4 image underneath that.

5 Q. Yes, sir.

6 A. Addressed to me at the I'On Company, at P.O.
7 Box 986, which is our old -- the old P.O. Box of the
8 I'On Company.

9 Q. Yes, sir. And however it's addressed, it
10 makes its way to you in the Civitas offices because
11 that's where you work, correct?

12 A. That would -- I'm not sure exactly when we
13 moved -- separated offices, but that's what it seems to
14 indicate.

15 Q. And, in fact, you just mentioned to the jury a
16 minute ago that you were in separate offices, correct?

17 A. I think I was at the time. I'm not sure when
18 we -- we moved sometime in '99, I believe.

19 Q. And if we jump to Exhibit 117 just for a
20 moment, Plaintiff's 117 -- excuse me -- jump to 38.
21 This is a draft of the formal agreement that's going to
22 emanate from the March Olde Park agreement we just saw
23 signed by the Griffiths, correct?

24 A. Yes.

25 Q. And if we go back to the main document and

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1 enlarge the top three inches of the page, we'll see
2 this draft contract for the Olde Park agreement, once
3 again, made its way to the Civitas office, who then
4 faxed it over to the I'On Company, correct?

5 A. Well, the Civitas date was February 12, '03;
6 and the one below it was September 13th -- or no, I
7 guess it's -- February 12th it says -- what does that
8 say, '03. And then the dateline below it, is September
9 13, '99.

10 Q. Yes, sir.

11 A. So I don't know if we have the date wrong on
12 the fax machine or something. I don't know.

13 Q. All right. So it's going through both the
14 Civitas office and the I'On Company's office, and we
15 can't be sure the progression on the dates, correct?

16 A. I assume that that's what's going on, one
17 would think. But then it also says February 12, '03,
18 which is way in the future.

19 Q. Sir, let's go to Plaintiff's Exhibit 42. The
20 easement and agreement to share costs, correct?

21 A. Yes.

22 Q. Now, did I hear you indicate earlier that you
23 think that that easement is perpetual?

24 A. Yes. That's what -- I mean, we thought it was
25 perpetual. I think everyone's agreed at one time or

V. GRAHAM -- CROSS BY MR. LUCEY

1 the another, the Assembly, to -- the 148 Civitas by
2 agreement, was perpetual except for you and your
3 plaintiffs.

4 Q. Sir, do you deny telling me previously under
5 oath -- or actually telling my associate, Josh Evans,
6 under oath, that I understand that the easement expires
7 after, you know, 18 more years or whatever --

8 A. I don't deny that there's a flaw in this, no.
9 That's what it would seem to indicate and we wanted --
10 everybody wanted to change that; again, except for you
11 and your plaintiffs.

12 Q. Sir, I didn't ask you about flaws, I asked you
13 whether you denied telling me or telling Mr. Evans
14 under oath previously, that I understand that the
15 easement after, you know, 18 more years or whatever?

16 MR. DUFFY: Objection, Your Honor. I'd like to
17 know which deposition and which page.

18 THE COURT: Okay. As soon as we get to it, do we
19 have a deposition there, and the page number, please.

20 MR. LUCEY: Permission to open the deposition,
21 Your Honor?

22 THE COURT: You may.

23 MR. LUCEY: 30 (b) 6 deposition, which I'll
24 occasionally -- actually I'm going to refer to as
25 volume three, page 140.

V. GRAHAM -- CROSS BY MR. LUCEY

1 BY MR. LUCEY:

2 Q. Sir, I'm directing you to page 140, please --
3 actually, let's start on 139 -- I'm sorry -- let's
4 actually start at page 138, line 20.

5 I asked you: "What's the I'On Company's view,
6 not your off the reservation view?"

7 Answer: "The I'On Company's view is that it
8 believes in community access."

9 Question: "And then why did it draft an
10 easement that expires in 18 more years?"

11 Answer: "That's what was put in there, so they
12 -- so the attorney may put that in there as something
13 that they typically put in on things like that."

14 Question: "The attorney put it in, but the I'On
15 Company approved it and signed it?"

16 Answer: "That's right."

17 Question: "It seems to me like that's contrary
18 to what you are telling me the I'On Company believes
19 in?"

20 Answer: "I don't know that it's contrary. It
21 may come with an expectation that one day it will be
22 extended."

23 Question: "There's no guarantee that the
24 current owner will or wants to extend it, correct?"

25 Answer: "I don't know."

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1 Question: "You don't have any evidence of that
2 or any information to provide?"

3 Answer: "I don't know what they want to do."

4 Question: "And when the time comes, it's up to
5 them, not up to the Assembly and not up to the I'On
6 Company?"

7 Answer: "I don't know".

8 Question: "Based upon your understanding of how
9 the easement is drafted?

10 Answer: "I understand that the easement expires
11 after, you know, 18 more years or whatever".

12 Did I read that correctly, sir?

13 A. Yes.

14 Q. Did you further tell the jury that the I'On
15 Company wants that easement to be perpetual today, sir?

16 A. I did.

17 Q. Do you deny previously telling Mr. Evans,
18 under oath, that you don't have any opinion on it one
19 way or the other?

20 A. I don't have any opinion on it one way or the
21 other?

22 Q. Yes, sir.

23 A. I don't think I said that directly, no. We
24 want it to be perpetual. It was always envisioned to
25 be perpetual when we wrote it. It's flawed. Everybody

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1 wanted to -- we wanted it to be perpetual. We always
2 envisioned the residents of I'On have access to those
3 facilities down there. The Assembly, 148 Civitas, all
4 at one point, had said that they wanted it to be
5 perpetual. You and your plaintiffs are the only ones
6 that didn't.

7 Q. Sir, may I direct you to page 156, please,
8 line 9. Mr. Evans asked you, Question: "Does the I'On
9 Company believe that the homeowners should have a right
10 to use and access the property regardless of the
11 easement expiration in 2030?

12 Answer: "I mean I haven't -- we haven't
13 developed any opinion one way or the other." Did I
14 read that correctly, sir?

15 A. You did.

16 Q. And, sir, you agree that if, in fact, nothing
17 is done to fix the easement, that in 18 years, the dock
18 will become a private dock, correct?

19 A. I think that's arguable.

20 Q. Do you --

21 A. But I do think the easement should be fixed.

22 Q. And you and your dad and your company and his
23 company had a opportunity to fix that easement before
24 you contracted to sell it to 148 Civitas, did you not?

25 A. Well, we were trying to get it fixed.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. You didn't, did you?

2 A. No, it's not fixed.

3 Q. And before you contracted to sell it, you
4 wouldn't need 148's consent, would you?

5 A. Before we contracted to sell it, we wouldn't
6 need their consent to make it perpetual?

7 Q. That's correct. You wouldn't need anybody's
8 consent except the Assembly's to make it perpetual,
9 correct?

10 A. Well, we would need their consent to enter
11 into the agreement.

12 Q. You would need the Assembly's consent?

13 A. No, 148 Civitas, we have to agree on terms of
14 the agreement.

15 Q. Before you contracted to sell CV-6 to 148
16 Civitas, you would not have needed their agreement to
17 amend the easement to fix it, correct?

18 A. We would not have needed the Assembly's
19 agreement to fix it?

20 Q. 148 Civitas, the buyer?

21 A. 148 Civitas? I mean, to be able -- no.

22 Q. Okay. And the Assembly has never told you
23 that they would not agree to a fix to make the easement
24 perpetual, have they?

25 A. No. In fact, we were working on it at one

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1 time.

2 Q. You were working on it until you contracted to
3 sell CV-6 to 148 Civitas, correct?

4 A. And we wanted to -- our intent was that the
5 easement would always be perpetual. And they had said
6 that also, Mr. Lucey. We've been through it time and
7 again.

8 Q. And 148 Civitas never signed an amendment to
9 that easement, did they?

10 A. No, not that I'm aware of.

11 Q. It's never been made perpetual, has it?

12 A. Well, it still says perpetual in the easement.

13 Q. On page three, correct?

14 A. I don't know what page.

15 Q. But you're aware that on page eight, there's a
16 paragraph 4.2 that says term?

17 A. I'm aware that that's -- that the easement is
18 flawed.

19 Q. Right. And term says --

20 A. And I regret that.

21 Q. And the terms say it can be cancelled by
22 either party on six months notice, correct?

23 A. I think that's right.

24 Q. Let me have Plaintiff's Exhibit 2 on the
25 screen, please. This is the Walbeck contract dated

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1 November 27, 1999, correct?

2 A. That's correct.

3 Q. He was given a Property Report on November 3,
4 1998, that was dated November 3, 1998, correct?

5 A. He was, yes.

6 Q. And we've already established about 15 minutes
7 ago with the jury, that the decision to deed the docks
8 to the Club instead of the Assembly occurred after
9 November 3, 1998, correct?

10 A. That's right, sometime in there.

11 Q. And we also said to the jury that we believe
12 it took place -- you said you believe the decision
13 occurred before March 24, 1999, correct?

14 A. Yes. You've helped lead me through that so we
15 arrived at that time period.

16 Q. The decision took place eight months before
17 the Walbeck contract, correct?

18 A. The decision to make those facilities at that
19 time part of the I'On Creek -- I'On Club did take place
20 then, yes.

21 Q. The decision to deed the docks to the Club
22 rather than the Assembly took place at least eight
23 months before the Walbeck contract, correct?

24 A. Yeah, that's eight months, right.

25 Q. So when Mr. Walbeck was taken down, around

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1 that bend, when he was looking to buy a lot; and he was
2 informed that that's where the Assembly's community
3 dock would be, that was false when stated, correct?

4 A. Absolutely not, Mr. Lucey. And if you go to
5 paragraph nine of your exhibit here, I'll explain why.

6 Q. I'll be happy to go to paragraph nine, sir.
7 Would you blow up paragraph nine for the witness,
8 please. Are you referring to what's called the "no
9 reliance clause", sir?

10 A. Yes, I am.

11 Q. You are aware that if a representation was
12 made to Mr. Walbeck, such as he testified, it would
13 have occurred before he signed a document including
14 paragraph nine, correct?

15 A. This is -- paragraph nine is what those in the
16 real estate brokerage community, and actually lawyers,
17 call a merger clause. It's part of what's called -- so
18 called a fully integrated agreement. And it basically
19 says, I mean, you have heard how emotional this issue
20 is. And people make representations, you know. I
21 mean, a spouse might make a representation to another
22 spouse what about they heard. You might have seen
23 something, a marketing brochure. You might have heard
24 me at a barbecue, after a couple of beers, explain what
25 it is.

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1 But what this paragraph says is that you can't
2 rely on anything else, you know -- we -- we made
3 representations to the Town in the Impact Assessment,
4 but you can't rely on anything else except what's
5 written in this agreement. And the next paragraph
6 talks about those facilities that would be -- become
7 part of the I'On Assembly, would be donated to the
8 homeowners association, so that's what this is.

9 Q. Just so the jury is clear, you are informing
10 them that if an oral representation otherwise was made
11 to Mr. Walbeck prior to signing this contract, you
12 believe that paragraph nine, the no reliance clause,
13 erases his ability to rely on the oral representation
14 by the I'On Realty, is that correct?

15 A. No, I don't. I believe -- but this is what
16 this states, that this is what you are to rely on,
17 what -- in this -- in this written agreement, as well
18 as the Property Report.

19 Q. Let's make this easy. Do you believe
20 paragraph nine erases his ability to rely on I'On
21 Realty's representations, or do you not?

22 A. I'm -- all I'm representing -- all I'm saying
23 is that this paragraph specifies what you are to rely
24 on. And if he wants to rely on something else, then he
25 can.

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1 Q. You are unable to give me a yes or no to that
2 question?

3 A. Well, we can just read it.

4 Q. I can read it, too. I want to know what you
5 believe. I want the jury to know what you believe. Do
6 you have an opinion -- let's just start there --

7 A. Yeah.

8 Q. -- do you have an opinion --

9 A. -- what I believe.

10 Q. Do you have an opinion as to whether or not
11 paragraph nine erases Mr. Walbeck's ability to rely on
12 oral representations made by the I'On Realty?

13 A. I believe that when you are purchasing real
14 estate, you must put things in writing so it's
15 absolutely clear what's being conveyed. That's what I
16 believe.

17 Q. You are unable to give the jury an opinion as
18 to whether or not paragraph nine erases his ability to
19 rely on the I'On Realty's statement?

20 A. I don't -- I don't know. That's -- that's an
21 argument for attorneys about whether or not he can
22 rely. I'm just saying that when you're selling real
23 estate, you want to make it clear what's in writing is
24 what's being conveyed; that's what this is.

25 Q. And I've been asking you about oral

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1 representations, let's change the question to the HUD
2 report, sir, exhibit one?

3 A. Fine.

4 Q. Do you have any opinion to share with this
5 jury whether or not paragraph nine affects Mr.
6 Walbeck's right to rely on the accuracy of the HUD
7 report that you signed and filed with the federal
8 government on November, 1998?

9 A. I think -- I think he should rely on that
10 Property Report. It's actually the same language as is
11 the very next paragraph.

12 Q. Sir, we are going to move forward in time.
13 Let me have Plaintiff's Exhibit 111 on the screen
14 please. And after you show page one, please go to page
15 three, middle paragraph that begins with "Chad
16 Besenfelder advised he would like" -- sir, these
17 minutes from September of 2007, are you familiar with
18 them?

19 A. Yes.

20 Q. And do you have any information that the Board
21 of Directors did not ask your manager, Chad
22 Besenfelder, to get with Ward Mundy to ascertain the
23 condition of the docks, whether or not they were ready
24 for turnover?

25 A. I'm sorry? Do you I have any information that

V. GRAHAM -- CROSS BY MR. LUCEY

1 he didn't do that?

2 Q. Yes, sir.

3 A. No.

4 Q. Exhibit 51, please. Plaintiff's 51, page 1.

5 Sir, it's hard to see, but we're going to blow up I'On

6 -- there's a subtitle under I'On at the top please.

7 The subtitle says "celebrating 10 years", correct?

8 A. Yes.

9 Q. And there is an I'On marketing brochure, and
10 ten years would date it to late '97, early '98,
11 correct? Roughly?

12 A. Probably 2007, yes.

13 Q. In 2007, and --

14 A. I don't know about late, it could have been
15 early. I can't remember remember one way or the other,
16 the big celebration.

17 Q. You participated in a lot of the drafting or
18 creation of many of the marketing materials, correct?

19 A. Yes.

20 Q. And you approved many of them, correct?

21 A. I did.

22 Q. And by 2007, we know that the Graham Company
23 is clearly managing the neighborhood for the -- excuse
24 me -- the I'On Group, LLC is managing the neighborhood
25 for the I'On Company, correct?

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1 A. Yes.

2 Q. And let's go to Bates stamp 83, please,
3 amenities. Top 83, yes, blow up the top three inches
4 on the left -- that's fine. Sir, there's a list of
5 amenities when you're celebrating ten years of I'On,
6 are you not -- are there not?

7 A. Yes.

8 Q. And the third amenity down is Community dock
9 and boat ramp, correct?

10 A. Yes.

11 Q. And the fourth amenity is three crab docks,
12 correct?

13 A. That's what this says, yes.

14 Q. Tell us which docks are the crab docks?

15 A. Well, if I had drafted this, I wouldn't have
16 called them the crab docks because that's your
17 definition. I would call them -- I would just have
18 said community docks.

19 Q. I'm sorry, sir, I don't want you to take my
20 definition for this. We are on I'On Company marketing
21 brochure that's --

22 A. I know. I already said some I prepared, some
23 I didn't. I wouldn't have called them crab docks.

24 Q. This is the company that your management
25 company is managing, correct?

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1 A. Yes. And I don't see everything, Mr. Lucey,
2 it's just -- like you probably don't see every little
3 word that comes through your office, I don't either.

4 Q. Your company's marketing brochure says there's
5 a community dock and boat ramp on one line --

6 A. That's what it says. It says "three". I can
7 read it. Every -- the jury can read it, too. It says
8 "community dock and boat ramp, three crab docks".

9 Q. Okay. So tell us which docks in I'On are the
10 three crab docks?

11 A. Well, I mean, you can actually -- you can crab
12 from every dock, so there could be five crabbing docks.

13 Q. Are you now telling the jury that you call the
14 docks at --

15 A. I'm calling all the docks -- I'm calling all
16 the docks community docks because that's what they are.
17 The only crab dock, really, by definition is that last
18 one we built that doesn't have a float or a ramp, that
19 you can drop a crab pot off of and pull it up. You
20 can't get down to the water on a float or ramp. That's
21 what a crab dock is.

22 Q. Sir, you don't call the community docks at the
23 CV-6 crabbing docks when you're walking through the
24 neighborhood talking to the homeowners; do you?

25 A. Well, I can't remember when the last time I

V. GRAHAM -- CROSS BY MR. LUCEY

1 was walking through the neighborhood talking to the
2 homeowners, I think of them -- as I just said --
3 they're all community docks.

4 Q. The docks --

5 A. The last one, the furthest one west, is more a
6 specific description of that, would be a crabbing dock.
7 Because that's about -- other than fish, high tide --
8 crab at high tide, that's about all you can do. You
9 can't get a kayak -- I guess you could toss your kayak
10 over the side, but it would be difficult.

11 Q. The last time you happened to walk through the
12 neighborhood and talked to homeowners -- how ever many
13 years ago that might have been -- the docks at CV-6 are
14 referred to in the neighborhood as either the community
15 dock, or the main dock, or the staging dock, correct?

16 A. I mean, I just -- I can't recall specifically.
17 The last time I was on that Marshwalk was probably --
18 less than a week or ten days ago, we were walking along
19 and talking about the community docks. A friend -- you
20 saw that -- the photograph earlier today of Allenberg
21 and his kids were swimming off the community dock. I
22 think the -- the dock three --

23 Q. How many docks --

24 A. -- so one of the docks at the Creek Club are
25 community docks. There's a staging dock and there's a

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1 main dock. Sometimes they're referred to as the
2 staging dock and the main dock. They're sometimes
3 referred to as community docks, or -- you know, they
4 are all community docks as far as I'm concerned.

5 Q. How many docks are on the tributary, sir?

6 A. Three.

7 Q. Three crab docks and three tributary docks; is
8 that correct?

9 A. That's -- in the Justin Lucey definition, but
10 not -- mine are not, and the state's definition, no.

11 Q. And let's go to Plaintiff's 85, please, the
12 bottom half. Sir, this is an e-mail by Chad
13 Besenfelder to South Carolina DNR, correct?

14 A. Yes. It looks like it. Steve Nichols and
15 McBride at the DNR. I would assume that's the South
16 Carolina DNR, yes.

17 Q. And Chad Besenfelder happens apparently to
18 possess or use an I'On Group e-mail address, correct?

19 A. He does.

20 Q. Does that indicate to you he was working for
21 the I'On Group by now?

22 A. Probably.

23 Q. Okay. And he's writing this letter in behalf
24 of the I'On Company, correct?

25 A. Yes.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. So it's Chad on behalf of the I'On Group and
2 on behalf of the I'On Company, writing the State of
3 South Carolina, correct?

4 A. Yes.

5 Q. And he says in the middle quote -- this is
6 April 23, 2008, correct?

7 A. Yes.

8 Q. And he says in the middle quote "We are ready
9 to deed this community dock and ramp to the homeowners
10 and wish to comply with regulations" end quote,
11 correct?

12 A. That's what it says, yes. We are ready to
13 deed this community dock and ramp which was actually --
14 I guess probably two docks, right.

15 Q. And tell the jury which community dock that
16 refers to?

17 A. Well, it probably refers -- it might refer to
18 just the community dock, the staging dock; or it might
19 refer to that larger dock, the pavilion; or it might
20 refer to both. I'm not sure what he's trying to say
21 here.

22 Q. Was this within Chad Besenfelder's scope of
23 authority for your company and for your company's scope
24 of authority?

25 A. To communicate with these governing agencies;

V. GRAHAM -- CROSS BY MR. LUCEY

1 yes.

2 Q. And your company's scope of authority for the
3 I'On Company?

4 A. Yes. We were managing it.

5 Q. Tell the jury -- he's writing on behalf of the
6 I'On Company, we see at the bottom left hand corner,
7 right?

8 A. The bottom left hand -- yeah.

9 Q. How is the I'On Company going to deed the
10 docks to the Assembly when they are owned by the I'On
11 Club?

12 A. Well, I don't know that they are owned by the
13 I'On Club -- well, they are owned by the I'On Club at
14 this point, yeah.

15 Q. Okay. So now we have established that. How
16 is the I'On Company going to deed the docks to the
17 Assembly when the I'On Club is the entity that owns
18 them?

19 A. Well, I mean -- you know, Chad wears many
20 hats. This is a signature block that he included
21 beneath, because he was also the general manager of the
22 I'On Company. So just because the signature block is
23 down here, it doesn't mean that it was the I'On Company
24 that was going to convey them.

25 Q. So he's the general manager of the I'On

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1 Company; and what was his position with the I'On Group,
2 please?

3 A. Well, we don't really have formal titles, but
4 he's -- I mean, I've often referred to Chad these days
5 as my general manager of the I'On Group. He's kind of
6 my -- he's a valuable employee. We only have a few
7 employees anyway. Also, I call him, you know, chief
8 visioner and bottle washer.

9 Q. So he's a manager of sorts, generally
10 speaking?

11 A. Sure.

12 Q. So he's a manager for both companies. And you
13 had --

14 A. Well, I manage him and he -- yeah, that's one
15 of his responsibilities, yes.

16 Q. Okay. And you had some ambiguity as to what
17 community dock this was referring to. If we go to the
18 next paragraph, it says quote "note the attached survey
19 of our community dock" end quote; do see that?

20 A. I do.

21 Q. Then if we go to page four of the exhibit, we
22 see once again "dock number one boat ramp plan view",
23 correct?

24 A. Yeah. We have the plan views. That says dock
25 number one; that shows the two docks.

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1 Q. And he's sending rules for those docks for the
2 conveyance, correct?

3 A. I'm not sure.

4 Q. Sir, let's go to Plaintiff's Exhibit 126.
5 This is an e-mail chain dated August 11, 2008. I'm
6 going to go to the second e-mail from Chad to Mike,
7 which reads "please see the latest offered revision";
8 do you see that?

9 A. I'm sorry. You flipped back -- where are you
10 reading? Yeah, I see that.

11 Q. Okay. Then below, he has a list of items,
12 correct?

13 A. It's covered up -- there you go. Yeah.

14 Q. And item number seven is that "the boat ramp
15 and dock are to remain I'On Company property, and will
16 allow Creek Club buyer access. Subject to HOA
17 approval, the I'On Company plans to convey the docks
18 and boat ramp to the HOA, retaining continued easement
19 for both I'On Club and Creek Club events", end quote,
20 did I read that correctly?

21 A. You did.

22 Q. So as of August 2008 -- August 11, 2008, the
23 plan was that the Assembly would get the ramp and
24 docks, correct?

25 A. That was envisioned as one of the

V. GRAHAM -- CROSS BY MR. LUCEY

1 possibilities it appears. But this is what, Chad was
2 writing to Russo?

3 Q. Yes, sir. And that's your manager again,
4 correct?

5 A. Yeah. I mean, he is -- he doesn't have final
6 signature authority on things, but this is what was --
7 they were working out an arrangement.

8 Q. So originally we have accomplished for the
9 jury that the plan before November 3, 1998, was for the
10 docks to be conveyed to the Assembly, correct?

11 A. Plan before November 3rd, 1998?

12 Q. Yes. Remember the change occurred between
13 November 3, '98, and March 24, '99?

14 A. We didn't -- we didn't have -- we didn't have
15 the -- again, that was back when we envisioned these
16 things, but we hadn't even applied for the docks at
17 that point. But that was envisioned in the Impact
18 Statement and, you know -- we would have community
19 docks and everyone would have -- be provided access to
20 those.

21 Q. A simple question, sir. We saw earlier that
22 the plan before November 3, '98, was to deed the docks
23 to the Assembly, correct?

24 A. No. I don't know if it was just to deed them
25 or to provide access to them, Mr. Lucey. I know you

V. GRAHAM -- CROSS BY MR. LUCEY

1 are trying -- you're -- you're -- your case hinges on a
2 few words and you're trying to trick me, but we don't
3 know.

4 Q. You didn't get up here and tell the jury at
5 the very beginning of your testimony, with your
6 attorney, that your company originally planned to build
7 the community docks at the Creek Club parcel, and your
8 company intended to convey those docks to the Assembly?

9 A. I remember talking about that, that we were
10 going to have community docks. They were going to be
11 made available to the neighborhood. And at some point,
12 we intended to deed them -- at some point we intended
13 on making them part of the I'On Club; at some point we
14 intended to deed them again. Plans changed depending
15 on the circumstances, depending on what the other
16 parties wanted to do.

17 Q. And then do you recall you and me establishing
18 that the decision to change --

19 A. Yeah, I do recall it --

20 Q. So --

21 A. At that time --

22 THE COURT: Wait. Wait. Wait.

23 A. I'm sorry. Go ahead. I'm sorry. I
24 apologize. I apologize, Your Honor.

25 THE COURT: That's fine. Please don't interrupt

V. GRAHAM -- CROSS BY MR. LUCEY

1 Mr. Lucey. Let him finish his question. She's very
2 good, but it's been a long day and she can't type two
3 people talking at the same time.

4 THE WITNESS: I'm sorry. I apologize.

5 BY MR. LUCEY:

6 Q. Then, sir, do you recall you and me
7 establishing that it was between November 3, '98, and
8 March 24, '99, that the change was made, that the docks
9 would be conveyed to the Club instead of the Assembly?

10 A. I did.

11 Q. So pre November 3, '98, the docks were
12 intended to be conveyed to the Assembly and we just saw
13 where the last two e-mails, in April of 2008, and the
14 e-mail we are on right now, August 2008, the docks are
15 intended to be conveyed to the Assembly, correct?

16 A. This is what Chad is suggesting in this
17 particular e-mail. And as I've tried to described,
18 plans changed about ownership over time and what the
19 vision was and who would own them. But the bottom line
20 was -- is that our vision was every property owner in
21 I'On would always have access to the docks and that's
22 why we put "perpetual easement". That was flawed.
23 Then we tried to change -- the Assembly wanted it
24 perpetual; 148 Civitas has, at times, suggested it be
25 perpetual, and we have -- I mean, you don't want it to

V. GRAHAM -- CROSS BY MR. LUCEY

1 be perpetual.

2 Q. Sir, I'm going to try and simplify the
3 question, so that we can move on. We just looked at in
4 April 199- -- excuse me -- 2008 e-mail to the State of
5 South Carolina. We are currently looking at an August
6 2008 e-mail to the Creek Club potential purchaser, both
7 of which indicate that the 2008 plan is that the docks
8 and boat ramp will be conveyed to the Assembly. And so
9 my question to you, sir, do you agree with what we've
10 just seen in these e-mails, that at least as between
11 April 2008 and August of 2008, your company's plan was
12 to convey the docks and boat ramp to the Assembly?

13 A. Now, with reference to this specifically on
14 the screen, I can just tell you I don't know. Because
15 sometimes Chad would say things in his earnestness to
16 try to keep a deal going without consulting me or my
17 father. And that we have -- that was oftentimes how we
18 made decisions. Someone would propose an idea, and it
19 would come back to us, and we would try to reach a
20 consensus on it and go forward.

21 Q. You are telling the jury that you, personally,
22 Vince Graham, do not know what the plan was for the
23 ultimate conveyance of the docks between April and
24 August 2008; is that correct?

25 A. I just -- I just don't remember.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. And that would leave the jury relying on the
2 documents in evidence that say what the plan is,
3 correct?

4 A. You mean this particular document?

5 Q. This one, and the April one to DNR, sir?

6 A. Well, those are -- those are two documents
7 that say that. That's in Chad's view, yes. That's
8 what they say. That's what these documents say. You
9 can you read them. I have agreed that that's what they
10 say.

11 Q. Plaintiff's Exhibit 15, please, and after
12 showing us page one, to put it in perspective, let's
13 stop there briefly. Thank you. Fifteen is on your
14 screen, sir. And it's an e-mail from Chad, your
15 manager, at the I'On group dot com, to the potential
16 buyer of the Creek Club, correct?

17 A. That's right.

18 Q. And if we go -- and it's dated September 9,
19 2008, correct?

20 A. Yes.

21 Q. And if we go to the second page, first full
22 paragraph, it begins TIC -- please enlarge that for the
23 witness -- it reads "TIC", and TIC is The I'On Company,
24 right?

25 A. That's correct.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. "Has maintained a good relationship with the
2 residents, but this took an enormous effort on our part
3 over the years. I understand that keeping the docks as
4 an entity of the Creek Club may help define the
5 property civic. However, I would suggest we leave our
6 initial idea of subdividing the docks and keeping TIC
7 control"; did I read that correctly so far?

8 A. You did.

9 Q. The next sentence reads, "The docks were a
10 promised handover to the homeowners, and Vince would
11 like to honor that some day" end quote, correct?

12 A. That's what it reads, yes.

13 Q. And this is being written by your long time
14 manager, Chad Besenfelder?

15 A. Well, I don't know how you define "long time",
16 I mean, he had just come over from the I'On Group. He
17 was originally with the -- managing the Creek Club.

18 Q. Okay. He's been with one of the I'On
19 companies for a number of years?

20 A. Well, the Club, as we've established, was a
21 wholly owned subsidiary of the I'On Company. So, yes,
22 Chad has been working -- I can't remember when he first
23 started, maybe 2004 or five, but he's not -- I mean,
24 Chad was not a real estate broker. He hasn't -- he
25 doesn't have a lot of experience in negotiating real

V. GRAHAM -- CROSS BY MR. LUCEY

1 estate sales, very little.

2 Q. And you are asked about this in your
3 deposition, correct?

4 A. I may very well have been. I don't recall
5 offhand.

6 Q. Did you happen to go back and ask Mr.
7 Besenfelder why he made that representation to the
8 potential buyers?

9 A. I think I said something to him at the time.
10 I think that's right.

11 Q. The -- let's go to -- off the screen, please,
12 Plaintiff's Number 209, marked for purposes of
13 identification only. Sir, Exhibit 209 is an October
14 14, 2008 -- from Mr. Besenfelder to you and your
15 father, correct?

16 A. Yes.

17 Q. And it's with regards to an ongoing dialogue
18 you all are having about getting the Town of Mount
19 Pleasant approval, and making sure that your use of the
20 property is proper, et cetera?

21 A. I haven't read over all of it, but that's what
22 it looks like, conveying general ideas about it.

23 Q. Is that generally correct, the way I described
24 it?

25 A. I'm sorry. Could you repeat the question?

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. It's generally -- with regards to the Town of
2 Mount Pleasant and the issue of the proper use of CV-6,
3 and making sure everything is hunky dory, correct?

4 A. I just finished the first paragraph, but it
5 seems to describe there is some consternation with the
6 Town, they just care about it remaining as a -- as a
7 civic use.

8 Q. And this is an e-mail that Mr. Besenfelder
9 sent to you and your father, correct?

10 A. It is.

11 MR. LUCEY: We move Exhibit 209 into evidence.

12 MR. DUFFY: No objection.

13 THE COURT: Exhibit 209 is admitted without
14 objection.

15 (Plaintiff's Exhibit 209 admitted into
16 evidence.)

17 BY MR. LUCEY:

18 Q. Mr. Besenfelder writes to you that he just met
19 with Mr. Russo and reviewed the strategy for the Town
20 of Mount Pleasant meeting, correct?

21 A. Yes.

22 Q. TOMP is the Town of Mount Pleasant?

23 A. That's right.

24 Q. And that the Town of Mount Pleasant had
25 already met with various residents, correct?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. Yes.

2 Q. And the town only cares about one thing -- if
3 you'll blow up the last three lines of the first
4 paragraph -- "the town only cares about one thing, is
5 the Creek Club operating as civic; and can it be sold
6 and continue to be civic". And Mr. Besenfelder goes on
7 to say, "Mike and I" -- he apparently is on a first
8 name basis with Mr. Russo --

9 A. It looks like it.

10 Q. "Mike and I are worried that the town will not
11 approve the sale. We need an absolute yes from the
12 Town agreeing, without a doubt, that the Creek Club is
13 a neighborhood clubhouse that serves the I'On citizens
14 and community affairs"; did I read that more or less
15 correctly?

16 A. "Serves the I'On citizens and community
17 affairs", yes.

18 Q. So he says -- he sets forth a plan, a proposal
19 down below that, as to what y'all need to do to make
20 sure you get -- or you get or keep the proper approval,
21 correct?

22 A. I -- move that out of the way, yeah --

23 Q. Let's blow up paragraphs one and two, please.
24 The first item is, "Do not separate the docks from the
25 Creek Club at this time. The docks are certainly the

V. GRAHAM -- CROSS BY MR. LUCEY

1 most civic part of the operations, and no property
2 owner or town official would be able to dispute this",
3 correct?

4 A. That's the way it reads, yes.

5 Q. So this is in contrast to the -- to the August
6 11, 2008, e-mail we just looked at where the I'On
7 Company was going to keep the docks and deed them to
8 the Assembly, correct?

9 A. This particular proposal is, yeah. May I
10 interrupt -- there's other ones underneath that, that
11 make it contrary.

12 Q. And you obviously told Mr. Besenfelder
13 immediately that it's not possible for us to sell the
14 docks, they were sold as community amenities, correct?

15 A. I'm sorry. Where are you reading that?

16 Q. I'm not reading it. I'm just saying your
17 natural reaction -- your automatic reaction would have
18 been to tell Mr. Besenfelder that it's not possible for
19 us to sell the docks; they were sold as community
20 amenities, correct?

21 A. I mean, no, not necessarily. I mean, we had
22 established a perpetual easement over them, so -- and
23 provided -- the perpetual easement was going to be --
24 continue to be in place.

25 Q. You agree it was not possible for y'all to

V. GRAHAM -- CROSS BY MR. LUCEY

1 sell the docks?

2 A. No. I mean, they were part of CV-6. They
3 were on that property.

4 Q. So you think you could sell them?

5 A. I mean, possibly.

6 Q. And you agree that they were sold as community
7 amenities, correct? They were sold to the purchasers
8 as community amenities?

9 A. No. I mean, I -- I think they were told about
10 that, yeah, at one time, as I've described numerous
11 times I think. All those docks were intended to
12 have -- to provide access to the waters.

13 (Plaintiff's Exhibit No. 231 marked for
14 identification.)

15 BY MR. LUCEY:

16 Q. Sir, I'm showing you what's been marked for
17 purposes of identification only as Plaintiff's Exhibit
18 231; and if you see on the very first line, it's an
19 e-mail from Vince Graham -- bracket
20 Vince@I'Ongroup.com -- close bracket, on Wednesday
21 March 12, 2008, correct?

22 A. Yeah. That's right. But -- that's what I
23 say, it's not possible for us to sell the docks. They
24 were sold as community amenities -- the Assembly could
25 do this, though, if they wished.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. This is what you told Mr. Besenfelder in your
2 e-mail to him, correct?

3 A. Yes.

4 MR. LUCEY: Plaintiff's move Exhibit 231 into
5 evidence.

6 MR. DUFFY: No objection.

7 THE COURT: Exhibit 231 is admitted without
8 objection.

9 (Plaintiff's Exhibit No. 231 admitted into
10 evidence.)

11 BY MR. LUCEY:

12 Q. And the jury heard it, but now they have got
13 it up on the screen -- in fact, let's -- before we go
14 to the top part, let's go to the bottom part. This
15 e-mail chain started with Mr. Besenfelder e-mailing you
16 on March 12, 2008, correct?

17 A. Yes.

18 Q. All right. And he -- the subject was
19 "interest in the docks", correct?

20 A. Yeah. He was interested in purchasing the
21 boat docks.

22 Q. And blow up the residents -- yes. Thank you.

23 A. So that's what he's talking about, it's not
24 possible to sell it to a group of eight people who are
25 interested in it.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. He said "I had a resident call me interested
2 in purchasing the docks. It seems like a group of
3 eight would pitch in. Not sure how this would work,
4 but if they agree to keep some of the boat ramp open to
5 I'On residents, it may be worth looking into. HOA
6 would probably flip out, but they did say they do not
7 want this liability", end quote, correct?

8 A. Yes.

9 Q. And in response to a proposal that the docks
10 be sold, you wrote Mr. Chad Besenfelder back in the top
11 e-mail -- of the substance please -- enlarge the
12 substance. "It's not possible for us to sell the
13 docks. They were sold as community amenities"; did I
14 read correctly, sir?

15 A. Yeah. I mean in the greater context, it's
16 like -- it's not possible for us to sell the docks in
17 this way, so that only eight people could use them,
18 without a perpetual easement on it. They are community
19 amenities. They are available to the larger community.

20 Q. Well, according to you, there was already a
21 perpetual easement on them?

22 A. That's what I just said.

23 Q. And you just said, it's not possible for us to
24 sell the docks, they were sold as community amenities,
25 and you're referring to the Creek Club docks, right?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. I'm saying it's not possible for us to sell
2 the docks in the manner below that he described, where
3 eight people own them, and put their dock there --
4 that's what was -- that's what this resident was
5 interested in, so they could just cut off other access
6 to the people -- other people.

7 Q. Sir, you simply wrote quote "it's not" --

8 A. I know what I wrote, but I'm telling you what
9 I meant by that. I'm addressing specifically his
10 e-mail right below that, Mr. Lucey.

11 Q. Sir, you simply wrote quote --

12 A. I could -- everybody can read that.

13 Q. "It's not possible for us to sell the docks,
14 they were sold as community amenities", correct?

15 A. Yes.

16 Q. Thank you. Now, let's go to Plaintiff's 182,
17 please. Sir, we are going to be very brief on this.
18 This e-mail chain is regarding amended recreational
19 easement ending on December 7th, 2008; do you see that?

20 A. I do.

21 Q. And it's an e-mail from your father to you,
22 correct?

23 A. Myself, Chad and Geoff.

24 Q. And it's an e-mail regarding the Assembly's
25 attempt to amend the easement prior to any sale to

V. GRAHAM -- CROSS BY MR. LUCEY

1 protect their rights, correct?

2 A. It just says "amended recreational easement",
3 I haven't read the rest of it.

4 Q. And, sir, did you read the proposed amendment
5 to the easement when it was sent to you by your father?

6 A. I don't recall.

7 Q. And your father's e-mail reads that "it is
8 attached", correct?

9 A. It's blocked by your...

10 Q. The first paragraph --

11 A. Right, uh-huh. Well, it just -- doesn't show
12 the attachment.

13 Q. Right. And then if we go to page three of
14 this exhibit, Plaintiff's 182, we see page one, a first
15 amendment to a recreational easement, correct?

16 A. Yes.

17 Q. And if we go to page three, paragraph two (a)
18 double I -- it's on page two of the easement, two (a)
19 double I, the amendment provided that the Assembly and
20 the community would have perpetual community access,
21 correct?

22 A. It says "Assembly shall continue to have
23 perpetual community access to the Creek Club property
24 in the same manner and to the same extent as in the
25 past. This access shall be restricted to current and

V. GRAHAM -- CROSS BY MR. LUCEY

1 future Assembly members only. And such community
2 access shall be governed by and subject to the
3 agreement to establish common space using I'On Creek
4 Club facilities, a 2008 agreement attached hereto as
5 exhibit blank" -- it seems like, again, they're just
6 trying to go over the terms, proposed terms.

7 Q. Exhibit 212, please. And, sir, you are aware
8 that no agreement was ever -- no enforceable agreement
9 was ever reached as a result of this correspondence
10 between Mr. Kinney and your father and yourself,
11 correct?

12 A. No. I don't know about enforceable or not,
13 but I -- I know that when they were talking about this
14 back and forth, there was no agreement reached.

15 Q. Right. And on page 212 is an e-mail, again,
16 from Tom Graham to you from February 2009, correct?

17 A. Yes, me and Chad.

18 Q. And it's -- in part, regarding -- well, it
19 says it's "regarding Creek Club issues", correct?

20 A. Yes.

21 Q. And one of the issues listed in paragraph one,
22 the third line, is "drunk drivers", correct?

23 A. "The idea of a future Creek Club operations
24 under new owners, expressed fears, included quote the
25 sky is falling in quote" --

V. GRAHAM -- CROSS BY MR. LUCEY

1 (Court reporter interruption.)

2 A. I was just trying to read it.

3 THE COURT: Well, if you're going read it out
4 loud, she has to be able to hear you.

5 A. Okay. Sorry. "Anxiety over future Creek Club
6 operations under a new owner, parentheses, expressed
7 fears included quote, the sky is falling unquote;
8 claims of weddings 365 days per year; uncontrolled
9 drunk drivers; residents squeezed out of event venue",
10 et cetera, closed parentheses. Matt Walsh told me that
11 he thought that if the I'On Club and Russo would go
12 along with cross use easement changes desired by
13 Catherine Templeton's crowd, that they would drop their
14 objections to current use". This is the -- just --
15 just as a way of background, Chad sometimes says these
16 kinds of --

17 Q. Your company was aware that the Saturday Road
18 residents were concerned that the operation of the
19 Creek Club as a major event venue was turning in to a
20 nuisance, correct?

21 A. Well, I -- I don't know if all the Saturday
22 Road residents or some, or some people who lived on a
23 different road, I don't know what he's specifying here.

24 Q. Well, if --

25 A. But there are probably some, I mean. I think

V. GRAHAM -- CROSS BY MR. LUCEY

1 Matt Walsh, he may live on Saturday Road and --

2 Q. Mary Simpson?

3 A. I'm not sure where Mary Simpson is --
4 mentioned in here. I don't know where she lives.

5 Q. By -- the first house by the overflow parking?

6 A. Is that where she lives. Okay. I don't know
7 if that's who he mentions -- who he means or not. It
8 doesn't say that.

9 Q. Plaintiff's Exhibit 56, please. Sir, you were
10 afforded a copy of the Assembly's demand on the I'On
11 Company that requested a turnover of the docks and the
12 identification of the Creekside Park, correct?

13 A. I may have been, I'm not -- I just see this as
14 directed toward my father.

15 Q. And Exhibit 183, please. Plaintiff's 183.
16 You were also in the loop relating to the I'On
17 Company's threat against Catherine Templeton, that if
18 she appealed the BOZA decision further, that they would
19 sue -- sue her for abuse of process, correct?

20 A. You know, some of the correspondences -- at
21 least this one, obviously -- although I don't see her,
22 is she mentioned in here? I -- I'm sorry, yeah, here
23 she is. I'm sorry. I haven't reviewed all these
24 documents, and I'm a slow thinker and reader.

25 Q. And, sir, we are going to go to Exhibit 214.

V. GRAHAM -- CROSS BY MR. LUCEY

1 I'On is a neighborhood that promotes social life,
2 correct?

3 A. It promotes a lot of things.

4 Q. Does that include social life?

5 A. I mean, I've never described it as social
6 life.

7 Q. It's --

8 A. It's a sense of community and it -- I mean, a
9 social life, I take it would be a part of that.

10 Q. Does it include -- does it promote dialogue?

11 A. It tries to promote positive dialogue, yes.

12 Q. Civility?

13 A. Sure.

14 Q. Discourse --

15 A. Yes.

16 Q. -- the people's right to voice their concerns?

17 A. I mean, in general, not on everything, but --

18 Q. I mean you --

19 A. On some things.

20 Q. Your company itself, in getting this whole
21 subdivision approved, you were swimming uphill a lot on
22 that, correct?

23 A. Sure.

24 Q. You were -- you had a new perspective on how
25 to handle things, correct?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. Not --

2 Q. Not?

3 A. -- knowing how to handle things, but -- I'm
4 sorry?

5 Q. A new perspective for Mount Pleasant as to
6 neighborhood design, correct?

7 A. Well, no, I wouldn't call it new. I mean,
8 this -- essentially the Old Village is built along the
9 same principles.

10 Q. Do you agree that people who have a concern
11 about your designs have a right to voice their opinion?

12 A. If it's a matter of something that impacts the
13 larger public, it's -- it's a public issue.

14 Q. And all these applications you've done for the
15 Town of Mount Pleasant, you agree they impact the
16 public, correct?

17 A. I mean, some of them do, some of them don't.

18 Q. All right. Well, the roundabout you talked
19 about, that impacts the public, right?

20 A. Sure.

21 Q. Any change to the HUD amendment for I'On
22 potentially impacts any I'On resident?

23 A. I mean, potentially, sure; probably; maybe.

24 Q. And those residents should have a right to
25 voice their opinion about those things, correct?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. Well, generally, yes.

2 Q. They didn't waive their right to voice their
3 opinion at town meetings just because they moved into
4 your neighborhood, correct?

5 A. Of course not.

6 Q. And yet there's a public meeting to invite
7 public input, that is the proper place for the public
8 to give their input, correct?

9 A. I mean, it depends on the circumstances, but
10 in general, yeah.

11 Q. And you told Catherine Templeton if she gave
12 any more public input, your company was going to sue
13 her, correct?

14 A. I didn't tell her that.

15 Q. Your company did, did they not?

16 A. I don't know if my company did -- I'm not sure
17 how that went down. I wasn't really part of that. I
18 mean, I was -- I was in some of these things, but I
19 didn't communicate with her directly. I don't know
20 that I even went to the meeting where -- the BOZA
21 meeting. I don't recall being there.

22 Q. Let's go forward to 215, please, Plaintiff's
23 215. Sir, we are going to show you, Thursday, March
24 19, 2009, e-mail from your manager, Chad, to you, with
25 an I'On update; do you see that?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. I do.

2 Q. And let's go to paragraph nine -- enlarge
3 paragraph nine, the property turnover. It reads "Boat
4 Docks: Working with Tom on the Creek Club to subdivide
5 parcel for HOA Dock and boat ramp turnover"; did I read
6 that correctly?

7 A. Well, actually, it just says ramp -- not boat
8 ramp, but otherwise, yes.

9 Q. And, in fact, he's giving you a list of
10 amenity issues that he's going to perform or he is
11 performing at this time, and item nine is just one of
12 others, correct?

13 A. I have to see the larger one.

14 Q. Go ahead and give him the larger one, so that
15 he can confirm.

16 A. It looks like a number of different things,
17 correct.

18 Q. And he's reporting to you, correct, because
19 he's a manager in your company, correct?

20 A. Yeah, he's informing me of what's going on
21 with that.

22 Q. And as of March 19, 2009, your company was
23 working on subdividing a parcel at CV-6 for the HOA
24 dock and ramp turnover to the Assembly, correct?

25 A. Yes, on item number nine, right.

V. GRAHAM -- CROSS BY MR. LUCEY

1 Q. All right. And the subdividing of a parcel of
2 land would be land -- at least adjacent to the -- to
3 the community dock access and the boat ramp access, so
4 people could get back and forth in between, correct?

5 A. Well, I guess that's HOA dock and ramp. I'm
6 not sure which dock he's specifying, or one, or both,
7 or...

8 Q. Well, the staging dock goes with the ramp,
9 right, sir?

10 A. Yeah, I mean generally, but...

11 Q. The whole purpose -- the whole purpose of the
12 staging dock is for a temporary tie-up with a boat
13 while you move your car and trailer out of the way,
14 correct?

15 A. Well, that's -- I mean that's one purpose.
16 That's not the only purpose. You can fish off of it,
17 as we have seen. But, yeah, that's primarily what it's
18 used for.

19 Q. There's no doubt in your mind that this item
20 number nine relates to this community dock at CV-6,
21 with the fancy roof pavilion, and the boat ramp, with
22 the staging dock next to it, correct?

23 A. I thought you just said it was the staging
24 dock?

25 Q. I'm sorry?

V. GRAHAM -- CROSS BY MR. LUCEY

1 A. I thought you just said --

2 THE COURT: All right, folks. We need to take a
3 quick break, just about a five minute break. Please
4 return to your jury room and don't discuss the case
5 yet, and I will have you back as soon as we can.

6 (WHEREUPON, the jury leaves the courtroom at
7 4:37)

8 THE COURT: Thank you. I apologize for
9 interrupting, but I certainly need a break. I know
10 they do as well. And I know Sharon probably needs one.
11 This is ridiculous back and forth about what's called
12 what, despite the fact that it's in documentation, it's
13 not going over well with the jury.

14 So I'm giving everyone some free legal advice, I
15 will advise you again, to take a look at the two men
16 who are outwardly gasping at some of the responses, and
17 encourage everyone to chat again about this. Let's all
18 try to regroup and take five and we'll come back, but
19 in the for-what-it's-worth category, there you go.

20 (WHEREUPON, a brief recess was taken.)

21 MR. YOUNG: Your Honor?

22 THE COURT: Yes.

23 MR. YOUNG: I've spoken with Justin a little bit,
24 we have a little scheduling request for some guidance.
25 We've got Mike Robinson here to testify, but based on

V. GRAHAM -- CROSS BY MR. LUCEY

1 the way things are going, I think we probably wouldn't
2 get to him at best until 5:30 or 6:00. With your
3 permission, I'd like to let him -- we'll bring him --
4 he'll be our only witness tomorrow.

5 THE COURT: Oh, really. Okay. Wonderful.

6 MR. DUFFY: Well, he wasn't next up.

7 MR. YOUNG: Yeah, we've got one more witness, but
8 do you understand what I'm saying?

9 THE COURT: Yeah, let him go. He can come back at
10 9:30. I think everybody is getting tired, including
11 me, so I understand. But I am serious about what I
12 said. I don't know if maybe I need to chat with the
13 lawyers a little bit after we wind up today, to find
14 out how far apart y'all ended up. I know you've worked
15 part of it out, but they are paying very good
16 attention. They are. Okay. Let's wait on Rutledge.

17 MR. YOUNG: Thank you.

18 THE COURT: All set. All right. Are we ready to
19 bring the jury in?

20 MR. LUCEY: Yes, Your Honor.

21 THE COURT: Okay. Thank you.

22 (WHEREUPON, the jury enters the courtroom at
23 approximately 4:48 p.m.)

24 THE BAILIFF: All jurors are present, Your Honor.

25 THE COURT: All right. Thank you, sir. And thank

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1 you ladies and gentlemen, I appreciate y'all letting us
2 take a quick break. We are ready to continue with
3 cross examination. Mr. Lucey.

4 MR. LUCEY: Thank you, ma'am.

5 BY MR. LUCEY:

6 Q. Sir, I'm going to go to 218 to help answer the
7 question we were just on, on paragraph nine, please.
8 This is an e-mail from your manager, Chad, again, to
9 you and your father on March 24, 2009. And it's blown
10 up, "future docks", -- and he's describing -- if you'd
11 go back to the main document for the witness please --
12 he's describing the options of deeding a minimal amount
13 of land to the Assembly or a partial to the Assembly
14 with the docks, correct?

15 A. Yes.

16 Q. And this is -- attached to this is two
17 drawings by Chad as to what it would look like,
18 correct?

19 A. Drawings?

20 Q. Let's go to the drawing, second page, please.
21 There is one option. And it shows some property along
22 the waterfront having an easement, correct?

23 A. Yes.

24 Q. And if we go to the following page, we'll see
25 the second drawing he has. And it reads -- could you

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1 blow up -- yes, sir, right there. The note above there
2 -- "deed linear parcel to I'On Assembly with Club
3 access easement", end quote, correct?

4 A. Correct.

5 Q. Go back to the main document -- right there.
6 Thank you. Now -- and this is essentially deeding a
7 piece of land with the docks, so that the people who
8 own the community dock, can access the ramp and vice
9 versa along that waterfront, correct?

10 A. Correct.

11 Q. And then deeding enough property to go ahead
12 and allow this linear park to connect up to the
13 Marshwalk Park, which is at 9:00 on this screen,
14 correct?

15 A. Yes.

16 Q. And where the dark ends and the white begins,
17 that's the intersection between the Marshwalk Park and
18 the linear park that's being considered for the docks
19 for the homeowners, correct?

20 A. Linear park?

21 Q. Yes, sir.

22 A. Yeah, the parcel.

23 Q. Linear parcel, correct.

24 A. The park -- you said park or parcel?

25 Q. Let's say parcel first, linear parcel,

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1 correct?

2 A. It says "deed linear parcel".

3 Q. Right. And would you confirm for the jury
4 that that linear parcel is at least in part located
5 where the creek front park described in the 1998 letter
6 to Olde Park was, as you testified earlier, built?

7 A. Well, I mean it's -- in general.

8 Q. Yes, generally, yes; correct?

9 A. I mean, it was not defined, but in general,
10 yes.

11 Q. Okay. And it not only makes sense, because as
12 you described to Olde Park, the Creek Club building
13 would overlook the park and Hobcaw Creek, correct?

14 A. Well, here Chad describes it as the "Creek
15 Club lawn".

16 Q. Yes.

17 A. And then linear parcel basically where the --
18 as I understand where the easement -- the perpetual
19 easement was anyway.

20 Q. And speaking of the Creek Club lawn, you are
21 referring to that area to the left on the screen -- to
22 the left of the building?

23 A. Yeah. On the west side, it looks like, it
24 wraps.

25 Q. And your company had a firm called Design

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1 Works to design a park, which included the Creek Club
2 lawn; did it not?

3 A. We had -- I had Clyde Timmons with Design
4 Works do a lot of work on the Marshwalk, and he did
5 some of landscape design around the creek walk
6 building.

7 Q. Were you here for your father's testimony
8 earlier this week?

9 A. Sure.

10 Q. Let me show you Plaintiff's Exhibit 227. That
11 is the Design Works, correct?

12 A. Yes.

13 Q. And if we go to P 1, sheet P 1, there's a park
14 on this diagram that, at least in part, includes what
15 you just described as the Creek Club lawn -- Creek Club
16 lawn, located about 10:30 or 11:00 on sheet P 1,
17 correct?

18 A. Well, it just says "site plan for Creek Club
19 and Shelmore Point Park" I mean, they would name these
20 things as they went. Shelmore Point, I mean -- I
21 recall in my father's testimony, with you going through
22 it before, they showed other parts of the Marshwalk,
23 that they said Hope Park and things like that. So that
24 little point, they may have called Shelmore Point Park,
25 and then they set the site plan for the Creek Club with

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1 all the landscaping around it.

2 Q. Right. So going back to my question, your
3 company actually designed a park to go, at least in
4 part, on -- on what you described as the Creek Club
5 lawn, correct?

6 A. On the -- they designed the landscaping around
7 the Creek Club, as I just said. I mean, I know you're
8 trying to call the whole thing a park, but I don't
9 really see it that way.

10 Q. I don't want to call it that. I'm reading on
11 the bottom right hand corner of your agent's drawing,
12 P 1. It says quote "site plan - Creek Club and
13 Shelmore Point Park" end quote, correct?

14 A. That's correct. They're referring to the
15 landscaping surrounding the Creek Club and something
16 that they have chosen to name Shelmore Point Park.

17 Q. And are you telling the jury that the park is
18 simply landscaping?

19 A. No. I was just -- I'm sorry, if y'all didn't
20 understand, but I'm saying that the design is for the
21 landscaping that surrounds the Creek Club and something
22 that the designer in this case, Clyde Timmons at Design
23 Works, called Shelmore Point Park.

24 Q. And, sir, do you see that there's a walk on
25 this diagram that goes from the community dock over to

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1 the boat ramp?

2 A. Yes, I do. That was never built.

3 Q. There is a walk there, correct? Today,
4 there's a walk?

5 A. I mean, you can walk, yes, you can; but it's
6 not built as per these plans.

7 Q. And, sir, that walk is in the same location as
8 the linear parcel that Mr. Chad Besenfelter just drew
9 in his attachment to the March 24, 2009, e-mail,
10 correct?

11 A. Yeah, approximately, yes.

12 Q. And if we can go back to Exhibit 218, please.
13 And so your company was considering the options of
14 deeding minimum land to the association with the docks,
15 or deeding this linear parcel in this exhibit, correct?

16 A. Yes.

17 Q. And under option two, the pro number one is
18 that if needed in negotiation, the Assembly may
19 consider this the Creekside Park, correct?

20 A. That's what he writes.

21 Q. It goes on to say below -- the cons. "I
22 suggested proposed option one" -- and option one above
23 is minimal land, right?

24 A. That's right.

25 Q. "I suggest we propose option one, see what

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1 happens. Be prepared to read negative message board
2 posts. The Assembly will likely ask for more
3 regardless of what proposed, so why not propose only
4 what we are obligated without getting into a legal
5 battle", correct?

6 A. That's what he writes, yes.

7 Q. He goes on to say in the second from the last
8 paragraph, "I'm also attaching a farfetched plan for
9 future opportunities", and he goes on to attach an idea
10 and a plan to keep the docks condominimize, and sell it
11 for \$960,000 in various numbers of slips, correct?
12 Twenty four slips?

13 A. He's describing what he calls a farfetched
14 plan that is highly unlikely. And what he's describing
15 is to add on to the main dock there, with a new float,
16 that would take a -- create a new grouping of docks on
17 the northeast side of that pavilion that you could sell
18 slips.

19 Q. For \$960,000?

20 A. Well, that's a chance estimate, I mean
21 that's -- as he says "farfetched". I don't see how
22 that could ever come to pass, but this is what Chad
23 sometimes -- sometimes writes things like this.

24 Q. I was unable to find your response to this
25 e-mail in the documents you all produced. So what I'd

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1 like to do is ask you to tell the jury what you wrote
2 back to Chad Besenfelder when he said to you, we can go
3 with option one, give them this easement along the
4 front. Option two, deed them the land. Or option
5 three, let's keep it and condominimize it or rent it
6 and make \$960,000; what did you tell him?

7 A. I really don't recall, Mr. Lucey, if I -- if I
8 said we said something -- if we discussed it, or wrote
9 back to him, or my father wrote back him, I don't know.

10 Q. Well, if you don't recall what you told him,
11 can you tell us what you thought, what your own mental
12 decision was when you looked at it and said, okay,
13 which one we should do -- which one were you going to
14 vote for if anybody asked for your opinion?

15 A. I may have -- I really don't remember what I
16 said. It would depend on the context of probably
17 something larger of what -- I would have to read
18 through this whole thing and go back and read through
19 the discussions and review, and think about what they
20 were. We didn't -- this is -- I mean, these are just
21 two options that are -- the farfetched one, I guess,
22 that Chad was proposing --

23 Q. Well, if you had to do it over today, which
24 one would you choose?

25 A. I mean, I don't know that I'd necessarily

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1 choose either one.

2 Q. Sir, let's go to Plaintiff's Exhibit 58, your
3 company's October -- excuse me -- March 25, 2009,
4 e-mail from Chad, at the I'On Group, to the property
5 manager, Jane, with cc'ed the board members, regarding
6 the I'On development update and the Board meeting, the
7 March 25th board meeting; are you with me?

8 A. I am.

9 Q. And in this first two paragraphs, your
10 company, through Chad, tells the Assembly that -- any
11 homeowners attending this meeting, that the sale to
12 Russo is off, and that your company is in the process
13 of deeding a parcel and community dock over to the
14 Assembly, correct?

15 A. Yes.

16 Q. And it specifically reads "We plan to
17 subdivide a parcel to be recorded and deeded", end
18 quote, correct?

19 A. Correct.

20 Q. And this would be very much in line with the
21 exhibit we just looked at, where your company was
22 deciding what size parcel you would transfer, correct?

23 A. That's right. I think it was proposal one.

24 Q. And, sir, you would agree with me that it was
25 entirely reasonable for the Assembly and the homeowners

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1 to rely on this representation by your company, the
2 I'On Group, correct?

3 A. Well, yeah.

4 Q. And, in fact, your I'On Group, in making this
5 representation, as is referred to in the paragraph, was
6 actually making the representation also on behalf of
7 the I'On Company, correct?

8 A. Yes.

9 Q. And your company was within the scope of its
10 authority in making that representation for the I'On
11 Company, correct?

12 A. Yeah, I think so. I don't see my father
13 copied on this.

14 Q. And if we go to Plaintiff's Exhibit 184, sir,
15 we'll see that discussions recommenced with the
16 proposed buyer, Mr. Russo, within 24 hours of your
17 company informing the Assembly that you were going to
18 deed the docks to the Assembly, correct?

19 A. Yes.

20 Q. In fact, if we go to page 3 of Plaintiff's
21 Exhibit 184, to the 7:32 p.m. e-mail from Mike Russo,
22 we'll see that discussions actually commenced in 10
23 hours, correct?

24 A. I guess so. I don't remember the last time
25 period you said, but I assume so.

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1 Q. And if we go to Plaintiff's Exhibit 220,
2 please. I want to go to the issue of those Matt Walsh
3 e-mails that you and your attorney were talking about,
4 about an hour and a half ago; do you recall that
5 discussion?

6 A. Do I recall discussing it with my --
7 discussing with Brian, yeah, about Matt Walsh.

8 Q. Right. And your dad had e-mailed you on April
9 2, 2009, regarding Matt Walsh's claims, correct, and
10 how you should be handling them?

11 A. You mean where it says "Vince, it seems to me
12 that neither Matt nor any other homeowner have any
13 legal basis to rely upon the Impact Statement submitted
14 to the Town of Mount Pleasant for any claim upon the
15 I'On Company. I have little patience left for this
16 B.S.".

17 Q. "I have little patience left for this B.S."
18 And your response back to your dad is in the most
19 recent e-mail at the top, in the first sentence, they
20 don't -- "I am just toying with he and Brock", correct?

21 A. That's how that reads.

22 Q. And that's what you were doing with Mr. Walsh
23 at the time, was it not?

24 A. Well, I was saying, they don't have any basis
25 by using the Impact Statement. That's what -- is that

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1 what the e-mail -- I was trying -- I can't recall what
2 exactly the e-mail said earlier. I was just trying to
3 explain the context of it.

4 Q. And in your explanations, you were just toying
5 with him?

6 A. Well, I mean, you have to understand that I
7 felt at the time that -- that Steve Brock was behind a
8 lot of this, and -- because he was -- lead the
9 opposition from the beginning. If Brock had his way,
10 there would be no I'On; so I was a little skeptical
11 that he would come forward with things like this.

12 Q. Matt Walsh was a representative of the Board
13 of Directors of the homeowners Assembly, was he not?

14 A. He was, and he was -- appeared to be getting
15 his information from either Brock or Ms. Adkins,
16 Brock's companion.

17 Q. If you were toying with a representative of
18 the homeowners association Board, you were toying with
19 the Assembly itself, were you not?

20 A. Well, I mean toying isn't -- I don't know what
21 I -- again, if we could look back what he -- we were
22 taking about in a larger context, I could probably
23 explain that.

24 Q. So you now not only are saying that Mr. Brock
25 is the reason for Lea Ann's claim, but you're also

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1 saying he's the reason that the Assembly is making a
2 claim; is that correct?

3 A. No. I don't think that's what I'm saying.

4 Q. And you also told the jury that Mr. Brock led
5 to five out of six Town of Mount Pleasant commissioners
6 being voted out of office?

7 A. No, I didn't say that.

8 Q. The community led to that, did it not?

9 A. I said the -- I told the jury that the council
10 members, who had supported I'On, were targeted for
11 defeat by a group of people opposed to I'On.

12 Q. And you go on to say in this e-mail, after the
13 next two rounds of e-mail exchanges with Walsh, "You'll
14 see what I mean. We will slam the door on this
15 foolishness and set the stage to enable them to take
16 over the dock ownership, it's costs,
17 responsibilities -- it's costs and responsibilities
18 under our terms and conditions", end quote, correct?

19 A. That's how that reads, yes.

20 Q. Exhibit 221. Sir, this is an April 8th, 2009,
21 e-mail where you continue to discuss related issues
22 with your dad; this one is from your dad to you,
23 correct?

24 A. It is.

25 Q. And before we get to the top e-mail, let's go

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1 to the earliest e-mail at the bottom. It's an e-mail
2 from Chad Besenfelder to you all, where he writes on
3 April 8th, quote, "I met with Mike Russo and the Creek
4 Club sale is back on", end quote, correct?

5 A. That's how it reads. I don't know who it was
6 written to. That's me and my dad, but I don't know --
7 it doesn't say.

8 Q. So as of April 8th, y'all started the
9 discussion ten hours after you told the Assembly you
10 were transferring the docks and a parcel of land to
11 them, and as of April 8th, you got a deal with Mr. -- a
12 second or third deal with Mr. Russo, correct?

13 A. I mean, that's what this would seem to
14 indicate.

15 Q. And your father writes to you in response to
16 this news -- he writes to you and Chad Besenfelder,
17 quote, "let's get the rest of these Steve Brock, Lea
18 Ann Adkins and HUD Mickey Mouse issues cleared up
19 quickly in order to preempt Steve Spear from getting
20 spooked -- respooked", end quote, correct?

21 A. Yes.

22 Q. And for the jury's information, Steve Spear
23 was Mike Russo's partner in the entity known as 148
24 Civitas, LLC, that y'all were trying to sell the
25 property to, correct?

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1 A. That's my understanding.

2 Q. And, sir, if we go to Plaintiff's Exhibit 194,
3 dated Tuesday, August 11, 2009, we see an e-mail from
4 your dad to Mr. Kinney, who at that time is the Board
5 President of the Assembly, correct?

6 A. Yes.

7 Q. And it's copied to you, correct?

8 A. It is, yes.

9 Q. And he informs Mr. Kinney that the sale closed
10 last week, correct?

11 A. Yes.

12 Q. Mr. Kinney, as we can see down below, was
13 under the misimpression that he was still negotiating a
14 modification to the easement with your company,
15 correct?

16 A. It was -- (reading) yeah, it was his
17 impression, it seemed to be. He said he's disappointed
18 that we are not able to agree --

19 Q. And you --

20 A. -- to the terms of the recreational easement
21 proposed on July 30th.

22 Q. Your company and the buyer kept it quiet so
23 you could get the deal closed before the Assembly could
24 block it, correct?

25 A. Well, I think they were under some kind of a

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1 -- I can't remember the provision, a nondisclosure
2 agreement or something like that. They were -- Chad
3 and my father were really in the middle of this, so
4 they could speak directly to that.

5 Q. And after you sold those docks and the land
6 between the docks to a third party profit making
7 entity -- if we go to 143 -- Plaintiff's Exhibit 143,
8 we'll see that four to five months later, you withdraw
9 the HUD registration for the I'On neighborhood from the
10 Interstate Land Sales Act for the first time, correct?

11 A. Yes.

12 Q. That registration was in effect during the
13 entire 11 years that you and I have been discussing
14 today?

15 A. That's right.

16 Q. And just a couple more minor things, sir.
17 One, you gave the jury your opinion about adequate
18 parking under the Mount Pleasant zoning laws for the
19 Creek Club; you are aware, are you not, that the rule
20 that you read to them about seating or square
21 footage -- or whatever it was -- changes if a facility
22 makes substantial use of their porches or other outside
23 amenities, the statute requires more parking?

24 A. I don't know exactly what it says. I just
25 understand that it was a hundred square feet per main

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1 hall. The main hall is 2400 square feet.

2 Q. And, sir, let's go briefly back to Plaintiff's
3 Exhibit 209. This is the e-mail by which Chad suggests
4 not to separate the docks from the parcel when selling
5 it to Russo, to make sure that the civic zoning doesn't
6 get challenged by the Town of Mount Pleasant; do you
7 recall that?

8 A. Yes.

9 Q. And this is -- e-mail is October 24, 2008,
10 correct?

11 A. Yes.

12 Q. And at the time your company decided to
13 separate those docks to make sure that the sale of CV-6
14 went through, our community was in an economic
15 recession, was it not?

16 A. Yeah.

17 Q. And, in fact, your company had had a very soft
18 year, correct?

19 A. 2008, yes.

20 Q. You had sold less than half of the budget of
21 13 to 30 homes, correct?

22 A. Is that -- is that what it says somewhere in
23 here? I can't recall. But if that's what it says,
24 then Chad was probably accurate.

25 Q. It's not in there, I'm just asking you the

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1 question.

2 A. I don't remember. I'd have to go back and
3 review the facts of what happened at that point.

4 Q. Do you recall telling Mr. Evans that your
5 company had only sold 11 of 17 lots that year?

6 A. A 11 of 17?

7 Q. Yes, sir.

8 A. I don't recall.

9 Q. Sir, you -- I'll hand it to you.

10 A. Is it in this one?

11 Q. No, it's a deposition. Would you turn to --
12 actually I need to give you this one. Would you turn
13 to page --

14 MR. DUFFY: Which one do you have, Justin?

15 MR. LUCEY: It's volume two, page 240.

16 BY MR. LUCEY:

17 Q. Line 18, the question was: "You sold half as
18 many properties as you expected to sell, correct?"

19 Answer: "In 2008?"

20 Question: "Yes, in 2008".

21 Answer: "We sold 13 home sales according to
22 this, we projected 30; and we sold 11 lots and
23 projected 17. I don't know what the percentage is."

24 Question: "You projected 47 sales combined and
25 you sold 24?"

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 Answer: "Twenty-four."

2 Question: "Twenty-four, so slightly more than
3 half?"

4 "Right."

5 Did I read that correctly, sir?

6 A. Yeah, you did. That describes the -- we sold
7 much fewer houses than lots, on a percentage basis.

8 Q. That describes the economic performance of
9 your companies in 2008, when they made the decision to
10 sell the docks to Russo, to make sure that the sale of
11 CV-6 went through without a zoning challenge of the
12 Town of Mount Pleasant, correct?

13 A. Well, it describes the activity of our
14 business. We were primarily in the business of selling
15 lots. The houses, we had a real estate company. And
16 if -- we get commissions from the sale of houses, but
17 it doesn't sound as bad as maybe Mr. Lucey would imply,
18 because we sold 11 of 17 -- projected 17 lots, which
19 that was our primary business.

20 MR. LUCEY: Thank you, sir.

21 THE COURT: Okay. Redirect?

22 MR. DUFFY: Thank you, Your Honor.

23 **REDIRECT EXAMINATION BY MR. DUFFY:**

24 Q. Vince, I want to correct or clarify a few
25 things. Let's look at the first deposition that Mr.

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 Lucey gave you.

2 A. I'm not sure if I still have it. I've got
3 this one.

4 Q. All right. Let me get the date of it. It's
5 the 30 (b) 6 on November 27, 2012. Here it is. Do you
6 remember going through the deposition where Mr. Lucey
7 was asking you about Mr. Evans showing you the term
8 portion of the easement?

9 A. Yes.

10 Q. Now, let's turn to page 214. I'll start at
11 215 actually. I'll skip a little bit. Okay.

12 Question from Mr. Whitaker, whose is in my
13 office: "When Mr. Evans was asking you questions, he
14 repeatedly characterized this document as expiring in
15 the year 2030, or otherwise made statements that after
16 18 years, it would no longer be effective; do you
17 recall those representations during the course of his
18 questioning?" Your answer?

19 A. "Yes."

20 Q. "Would you turn to page two of this document,
21 exhibit 10, beginning at the bottom of page two in
22 section 1.1, and please read through that section. And
23 let me know if you agree that this is where an easement
24 for the use of the dock and boat ramp at the Creek Club
25 is actually being granted". Answer?

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1 A. "Yes."

2 Q. "And at the very top of -- kind of at the
3 bottom of page two and at the top of page three, you
4 see where it says that what's being granted is a
5 perpetual, nonexclusive easement?"

6 A. "Yes".

7 Q. "So do you agree with me that that could be
8 construed to mean that the easement itself is being
9 given as perpetual and not limited to 30 years?"
10 Answer?

11 A. "Yes."

12 Q. Okay. Now, there was some discussion about
13 the issue of Ms. Templeton and her appeal, and whether
14 she was going to -- you know, whether there was a
15 threat to bring suit against Ms. Templeton. Let's look
16 at D 32, please, Lea Ann, second page at the top. I'm
17 sorry, I meant 132. I said 32. Okay. Go ahead and
18 highlight that. Now, do you see that this is the time
19 when Ms. Templeton was suggesting, and we heard it
20 before, that this zoning challenge could basically
21 make -- make the Creek Club not valuable for the
22 owners; is that a fair suggestion?

23 A. Right.

24 Q. And do you recall that the suggestion of what
25 Ms. Templeton was doing, was that -- that she was

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 abusing the process because she was voicing her public
2 concern, or was it that she was intentionally
3 interfering with the contract that you had in place?

4 A. Well, it seems like she was intentionally
5 interfering with it.

6 Q. That's fair enough. It's a different claim
7 from abuse of process that was suggested to you?

8 A. I think called it's called -- is it tortuous
9 interference?

10 Q. Yes. Okay. Now, we talked about -- if you
11 recall, I'll try not to -- I know it's late in the
12 afternoon, so I'm not going to go through all the
13 exhibits, Lea Ann, if you can put that one down. But
14 do you recall the Living In I'On newsletter that we
15 looked at before?

16 A. Yes, it's right here.

17 Q. Okay. And do you recall that it, in fact,
18 indicated the Assembly and Russo had an agreement on
19 the easement that they were happy about?

20 A. I do.

21 Q. Okay. And let's look at -- I want to ask you
22 to look at Defendant's -- okay. Just review that
23 please, it's for identification only. Would you put up
24 Plaintiff's Exhibit 86, please. Okay. Let's go
25 through until we get to a drawing, I think, maybe it's

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1 page four. Okay. Let's look at the bottom corner
2 here. Mr. Lucey has continually identified this --
3 proposed activities, community waterfront in the
4 application that was submitted; do you recall that?

5 A. Yes.

6 Q. Okay. Now, do you recall whether there was a
7 challenge to whether the docks on civic lot 6 were
8 challenged as -- as being community waterfront
9 recreation?

10 A. No. Well, I mean, they -- they are challenged
11 here. But I guess the answer would be "yes" in this
12 exhibit 104, Mr. Lucey --

13 Q. Well, does Exhibit 104 refresh your
14 recollection?

15 A. Yeah, that's -- that's the challenge.

16 MR. DUFFY: I move Exhibit 104 into evidence, Your
17 Honor.

18 MR. LUCEY: Is it just one page?

19 MR. DUFFY: Yes.

20 MR. LUCEY: Thank you. No objection.

21 THE COURT: Okay. Exhibit 104 is admitted without
22 objection.

23 (Defendant's Exhibit No. 104 admitted into
24 evidence.)

25

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 BY MR. DUFFY:

2 A. That's not Exhibit 104.

3 Q. That's fine. You just tell us what Exhibit
4 104 is?

5 A. This is a letter written by Blair Williams
6 of -- of the Department of Health and Environmental
7 Control, Catherine B. Templeton, Director, to Justin
8 Lucey.

9 Q. It's to Mr. Lucey. And tell us why they are
10 writing to Mr. Lucey?

11 A. Well --

12 MR. LUCEY: Objection, foundation.

13 Q. Well, let's put it --

14 THE COURT: Have you seen -- you knew the exhibit
15 that he's referencing -- have you got it?

16 MR. LUCEY: It's 104, I'm looking at it real
17 quick.

18 BY MR. DUFFY:

19 Q. Let's blow up the top part, please. Okay. Do
20 you see on the first sentence here, that DHEC has
21 reviewed Mr. Lucey's letter of November 16, 2012?

22 A. Yes.

23 Q. Okay. Now, let's look at the next paragraph,
24 please. Do you see where it says "the department does
25 not believe there was a misrepresentation by the

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 applicant that the staff relied upon"?

2 A. Yeah. This is the response to Mr. Lucey,
3 fishing to see if there was some violation, and they
4 said that there wasn't one.

5 Q. Thank you, Lea Ann, you can put that down.
6 Now, this Plaintiff's Exhibit 231 you probably have in
7 front of you, which was an email from you to Chad about
8 not selling the docks as they were community amenities?
9 There was a proposal being presented to you; do you
10 recall that?

11 A. Yes.

12 Q. Do you have it in front of you?

13 A. I do.

14 Q. Now, tell me one thing: Does an amenity for a
15 community, does that mean it is owned by the community?

16 A. No.

17 Q. Is the -- are the pools and the tennis
18 facilities amenities in I'On?

19 A. Yes.

20 Q. Would you have sold the pools and tennis
21 facilities in I'On to a group of a few individuals who
22 wanted to keep everybody else out?

23 A. No.

24 Q. In fact, this effort here, 231, it refers to
25 docks, plural; doesn't it?

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 A. It does.

2 Q. Were there docks plural in the 1998 Property
3 Report?

4 A. No.

5 Q. In fact, let's look at -- let's look at
6 Plaintiff's Exhibit 56, which was flashed up in part.
7 This is something that -- maybe I'm just wanting to
8 focus on -- but let's look at this paragraph. This is
9 Mr. Kinney writing to your father; is that right?

10 A. Yes.

11 Q. Mr. Kinney, at the time, was the head of the
12 homeowners association; is that right?

13 A. He was.

14 Q. Okay. And do you see that he's providing his
15 concerns to your father about the -- what's listed as a
16 community dock in I'On?

17 A. That's right.

18 Q. Okay. And do you see here, Lea Ann, let's
19 just blow up this bottom few lines here. I'm sorry.
20 We've got to go up a little bit more. Okay. Do you
21 see that it lists a quote "community dock"?

22 A. I do.

23 Q. Okay. And do you see that after looking at
24 the description et cetera, from the Impact Statement
25 and reading that there were to be no private docks,

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 which we have discussed before vs. individual docks?

2 A. Yes.

3 Q. It seems clear that the HUD Report
4 contemplated the multiple docks at the Creek Club; do
5 you see that?

6 A. I do.

7 Q. Okay. So here, and in other exhibits, we see
8 that there's an effort to say that "community dock"
9 clearly means these multiple docks at the Creek Club;
10 do you see that?

11 A. I do.

12 Q. Do you agree that that's what was represented
13 in the 1998 Property Report?

14 A. I absolutely do not.

15 Q. Now, there's some discussion about what --
16 whether Mr. Walbeck could rely on what Mr. Orange may
17 have told him; do you recall that?

18 A. Yes.

19 Q. Is it true that you can't be sure of what Mr.
20 Orange tells Mr. Walbeck?

21 A. That's true.

22 Q. Is it true that you can be sure what Mr.
23 Walbeck is going to say Mr. Orange told him?

24 A. It's true.

25 Q. Do you take care of that in contracts when

V. GRAHAM -- REDIRECT BY MR. DUFFY

1 selling property?

2 A. We do.

3 Q. In fact, let's look at -- we know that -- from
4 Mr. Walbeck's testimony, that he said he knew that
5 the -- the Creek Club and community docks were on a
6 civic lot; he got maps from Mr. Orange that showed it
7 as a civic lot; do you recall that?

8 A. I do.

9 Q. Now, let's look at Defendant's 35. I think it
10 may be the third page. Here we go. Let's blow up this
11 part here. Okay. Now, I'll spare everybody looking at
12 the bottom part. There is a conditional plat that
13 involved the phase II; is that right?

14 A. Yes.

15 Q. Okay. Now, we've seen the other one that has
16 a reference to the easement once that's recorded,
17 correct?

18 A. Correct.

19 Q. That's in the final plat of phase II; is that
20 right?

21 A. That's right.

22 Q. Okay. But this plat, which was always there,
23 always indicates this as civic lot 6; is that right?

24 A. Yes.

25 Q. Let's look at 36, please, Lea Ann. Third page

1 maybe on this one. All right. Let's blow that up,
2 please. Is this the final plat of phase II?

3 A. Yes.

4 Q. And -- or a final plat of phase II -- and does
5 it indicate CV-6 on a civic lot?

6 A. Yes.

7 Q. Vince, were your plans and visions for I'On
8 shown in 1997 in the Impact Statement or assessment --
9 whatever it is -- Impact Assessment and in the dock
10 master plan of Defendant's Exhibit 4, 1997?

11 A. Yes.

12 Q. Were those included in the 1998 Property
13 Report?

14 A. No.

15 MR. DUFFY: Thank you. Nothing further, Your
16 Honor. Thank you.

17 THE COURT: Okay. Anything further?

18 MR. LUCEY: Just briefly, Your Honor.

19 **RECROSS EXAMINATION BY MR. LUCEY:**

20 Q. Do you have 104 in front of you still, sir?

21 A. I do.

22 Q. This is the January 23, 2013 DHEC letter to me
23 that you and counsel were just referring to?

24 A. That's correct.

25 Q. They actually did find that commercial use of

1 the dock was not in compliance with the previously
2 issued permit; did they not? Did you look at the
3 second to last sentence in this letter?

4 A. "However, the use of dock as commercial is not
5 in compliance with the previously issued permit."

6 Q. Right. And with regards to there not being a
7 violation of -- of information in the application,
8 their basis for reaching that conclusion was that the
9 -- if you look in the middle of the second paragraph,
10 it says the easement and ownership changes resulted
11 after the issuance of the permit, correct?

12 A. Yes.

13 Q. You never shared with DHEC that, in fact, you
14 made the decision to change the ownership between
15 November 3, 1998, and March 24, 1999, five months
16 before you filed the DHEC dock application, correct?

17 A. I don't -- I don't know.

18 MR. LUCEY: Thank you, sir.

19 THE COURT: Okay.

20 **REDIRECT EXAMINATION BY MR. DUFFY:**

21 Q. Mr. Graham, is this a change in ownership from
22 having it at the I'On Club, or is there a change in
23 ownership to Mike Russo? Can you tell that from there?
24 Mr. Lucey is suggesting the decision was going to the
25 I'On Club, and we can put in Mr. Lucey's letter, but in

1 any event --

2 A. Yeah, this is, I think, it seems to be
3 suggesting that it was changing to 148 Civitas.

4 MR. DUFFY: Thank you.

5 **RECROSS EXAMINATION BY MR. LUCEY:**

6 Q. Sir, we just read the jury the sentence that
7 says "the easement and ownership changes resulted after
8 the issuance of a permit", correct?

9 A. Yeah.

10 Q. The easement you and I discussed for 30
11 minutes today was executed in February of 2000,
12 correct?

13 A. I believe that's right.

14 Q. In February of 2000, Russo wasn't even in --
15 in somebody's vision, correct?

16 A. No.

17 Q. So this is clearly with regards to the
18 application to DHEC for dock permits, correct?

19 A. Well, it says the easement and ownership
20 changes resulted after the issuance of the permit.

21 Q. We had an easement in February 2000, and we
22 had an ownership change on April 15, 2000, from the
23 I'On Company to the I'On Club, correct?

24 A. And another ownership change from I'On Club to
25 Mike Russo.

1 MR. LUCEY: Thank you, sir.

2 THE COURT: Thank you, sir. You may step down, or
3 back to the table. Okay. I hear there are a few
4 witnesses left. How long is the next one? Is he here,
5 she here?

6 MR. DUFFY: Yes, Your Honor. I think it's --

7 THE COURT: What do you all want to do? I mean,
8 we can finish them in the morning if we --

9 MR. DUFFY: We're definitely not going to finish
10 them all today. So, yes, we can finish them in the
11 morning.

12 THE COURT: Okay. How about that, and I'll confer
13 with my jury. My goal is to get this to y'all at a
14 reasonable time tomorrow, so you won't be here -- would
15 you rather be here a little later today or a little
16 later Friday, I guess is my point.

17 (Multiple jurors said "today".)

18 Today. All right.

19 MR. DUFFY: All right, Your Honor.

20 THE COURT: Well, let's do one more.

21 MR. DUFFY: Thank you. The defense calls Debra
22 Bedell, president of the homeowners association.

23 THE COURT: All right. Ms. Bedell, if you'll come
24 on up, we'll swear you in.

25 DEBRA BEDELL, after having

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1 been duly sworn, testified as follows:

2 THE CLERK: Thank you, ma'am. Please have a seat,
3 and please state your full name for the record.

4 THE WITNESS: My name is Debra Bedell, last name
5 is B-e-d-e-l-l.

6 **DIRECT EXAMINATION BY MR. DUFFY:**

7 Q. Hello, Ms. Bedell.

8 A. Hello, Mr. Duffy.

9 Q. Can you tell -- tell me when you first got on
10 the Board of Directors at I'On?

11 A. I was elected to the Board in December of
12 2009, to serve for a term from 2010 to 2011. In the
13 summer of 2010, my husband and I decided to temporarily
14 relocate to Maine so he could attend a furniture making
15 school for nine months. And so I resigned my position
16 on the Board effective either July or August of 2010.

17 We went to Maine in 2010, returned in early June
18 of 2011. And at the end of 2011, I was elected to the
19 Board for a two year term for 2012/2013. Then at the
20 end of 2013, I was elected to the Board for a further
21 one year term, which expires at the end of this year.

22 Q. Now, I'm sorry if I missed it -- I asked
23 initially about being on the Board. You have been
24 President of the Board; is that right?

25 A. I have been President of the Board for the two

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1 year term 2012/2013, and I continue as President of the
2 Board this year.

3 Q. Okay. Thank you. Okay. Now, is it fair to
4 say that you've been heavily involved with this
5 litigation since you -- since you were elected
6 President?

7 A. Unfortunately that is a fair statement.

8 Q. Okay. And is it true that you held the
9 community meeting in January of 2013 to address the
10 litigation?

11 A. Was it 2013 or 2012? I'm honestly not sure.
12 It was just a year ago. I guess it was -- you're
13 right. I'm sorry, 2013. That's correct.

14 Q. So January 2013. And that, in fact, at the
15 time was shortly before the trial had been planned?

16 A. That's -- the original scheduled trial date,
17 yes.

18 Q. Okay. And you had done an investigation of
19 the issues involved in the case before you made a
20 presentation to the I'On community; is that fair?

21 A. There was -- there was a lot of discussion in
22 the community about the litigation at that time. And I
23 felt that, in my role as Board president, it was
24 important for a representative of the Board to try and
25 communicate a fairly factual chronology of all of the

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1 events that had transpired. So to do that, I reviewed
2 a number of documents, not everything I -- obviously
3 that has been dug up in the past few years, and I
4 talked with a number of members of the community who
5 had been involved in some of the transactions.

6 So the first purpose of the meeting was really
7 to kind of inform the community in a fair way -- just a
8 history of everything that had happened.

9 And the second purpose was to try and figure out
10 from the -- from listening to the community, what their
11 feelings were about what we, as a Board, should be
12 doing, what kind of a position we should take, that
13 sort of thing.

14 Q. Okay. And certainly you had reviewed the 1998
15 Property Report at that point?

16 A. No. I did not have access to that.

17 Q. You didn't? Well, you attended Mr. Lucey's
18 presentation to the neighborhood folks --

19 A. No, I did not.

20 Q. -- had you not?

21 A. I did not attend.

22 Q. You were aware he had made one?

23 A. I was aware he made two, I think. There was
24 at least one before my presentation, yes.

25 Q. Okay. Well, I want to make this quick enough,

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1 but would you agree with me that you had and reviewed
2 the 1998 Property Report in late 2012.

3 A. I had seen it presented in a mediation
4 session. I had not ever -- I've never had an
5 independent copy of it. I've never personally reviewed
6 that document, and I have never attended Mr. Lucey's
7 public presentations about this case to the I'On
8 community.

9 Q. Did you talk with other Board members about
10 the claims that were being raised and what the Board
11 had done before you made your presentation?

12 A. Yes, I did.

13 Q. And tell me who that included.

14 A. I know I spoke directly with Bruce Kinney.
15 And I think an e-mail exchange with Ed Clem, who is my
16 neighbor. I'm not sure that I actually sat down with
17 Ed and talked to him directly about that. But I did go
18 to Bruce's house and sit down and we talked for quite a
19 while.

20 Q. And in part, you wanted to find out what the
21 Board had known throughout this timeframe; is that
22 right?

23 A. I wanted to find out the history of actually
24 what had happened, because for much of this, I didn't
25 actually even live in the community.

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1 Q. Right. And -- and part of what you were doing
2 for the community, was to talk about what the Board had
3 done throughout this time; is that right?

4 A. Yes. What all the people -- all had done.

5 Q. Right. And so you wouldn't know what the
6 Board knew without asking the people that were on the
7 Board at that time necessarily?

8 A. Yes. Bruce was the Board President, so he was
9 the logical person to talk to.

10 Q. So the Board knows things to let its people
11 know, correct?

12 A. That's correct.

13 Q. Now, let's see, you started -- before the trip
14 to Maine, when did you start on the Board?

15 A. In those days, we took office on January 1st,
16 so that would have been January 1, 2010. Ten -- yes,
17 sorry.

18 Q. Okay. And ultimately when you -- when you
19 came back it was -- I'm sorry -- it would have been
20 January --

21 A. It would have been -- we came back from
22 Maine -- I'm sorry -- when we came back to the Board or
23 when I came back from Maine?

24 Q. Yeah. Thank you. When you came back to the
25 Board?

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1 A. When I came back to the Board, again, it would
2 have been January 1, 2012?

3 Q. And so from that point on, you have been
4 involved with dealing with the litigation?

5 A. Yes, exactly.

6 Q. And January, we have -- let's see. January
7 23rd of 2013, does that sound like the --

8 A. It sounds good.

9 Q. The date for the meeting? And it was in
10 anticipation of a trial that had been scheduled in
11 February?

12 A. I believe that's the date, yes.

13 Q. Now, in fact, the trial didn't happen then,
14 but is it a fair characterization that not much really
15 happened in the litigation between this trial date and
16 the next trial?

17 A. Let me think about that. There was certainly
18 a lot of discussion, whether there was a lot of actual
19 legal motion in the to-ing and fro-ing, we went to
20 trial -- there were some sort of behind the scenes
21 discussions. But so far as I know, except maybe for
22 motions or something in front of the Court -- and there
23 may have been some of those, I don't recall any
24 particularly significant legal developments during that
25 time.

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1 Q. Thank you. And the jury's heard some
2 reference to ultimately there was a trial that, you
3 know, started up -- or we had gotten somewhere close to
4 getting resolved in January of 2014; is that correct?

5 A. That's correct.

6 Q. Now, let's see. Okay. Now, after -- it was
7 after the initial meeting here in January 2013, where
8 you gave your deposition initially in this case; is
9 that correct?

10 A. If you say so, I'll trust you on that.

11 Q. We'll get there, January 30, 2013?

12 A. Okay.

13 Q. Now, ultimately -- ultimately the Assembly
14 came to an agreement related to this lawsuit in January
15 of 2014; is that right?

16 A. Yes, we did.

17 Q. Okay. And I don't have the date in front of
18 me. Do you happen to remember that?

19 A. What was the date the trial started?

20 Q. If I knew that, I would have told you.

21 A. Then it's the same date.

22 Q. Fair enough. January, 2014.

23 A. Okay.

24 Q. I think it maybe was the 18th.

25 A. The 18th, 28th, I think it had an eight in it,

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1 but -- it was a Monday.

2 Q. So that's when the Assembly had come to terms
3 with -- an agreement that involved the plaintiffs, and
4 148 Civitas, and Mr. Russo?

5 A. That's correct.

6 Q. Now, that agreement was something you embraced
7 as the leader of the Assembly; is that right?

8 A. Yes, I did.

9 Q. And you agreed to it, in fact?

10 A. Yes.

11 Q. Okay. Now, would you agree with me that it
12 includes things, in that agreement, that the Assembly
13 will get that were not part of claims in the lawsuit
14 before that?

15 A. I -- I hate to answer a very open ended
16 question like that. Are you referring to something
17 specific that you think we wouldn't have gotten in the
18 lawsuit that we got as part of the agreement?

19 Q. Are you aware of any promise by any defendant
20 to convey civic lot 5 free of charge to the Assembly?

21 A. Civic lot 5? No, I'm not aware of any promise
22 to do that.

23 Q. That's the overflow parking lot?

24 A. Yes.

25 Q. Now, the settlement involved the Assembly

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1 paying \$495,000; is that right?

2 A. Yes.

3 Q. And did that come from the reserves of the
4 Assembly?

5 A. It did.

6 Q. Which at the time were --

7 A. My recollection is, at that time,
8 approximately \$1.3 million.

9 Q. Okay. And, in fact, no increase in the
10 homeowners' dues or fees resulted from this settlement;
11 is that right?

12 A. We did increase dues following the settlement,
13 yes. And certainly increased costs that arose out of
14 the settlement were part of that increase.

15 Q. Okay. I'm going to hand you your second
16 deposition, Ms. Bedell. Do you recall that since the
17 agreement, you've been over to my office to talk about
18 some of these issues under oath; is that right?

19 A. Yes.

20 Q. And that was on July 10, 2014, and I'll give
21 you that original.

22 A. Okay. Thank you.

23 Q. Could you turn with me please to page 50?

24 A. Yes.

25 Q. Okay. And I asked you: "Did the payment of"

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1 -- I'm sorry -- I'm on line 16. "Did the payment of
2 \$495,000 related to the exhibit 1 terms result in an
3 increase of dues or fees for homeowner association
4 members?" And your answer was?

5 A. My answer was "The payment per se was probably
6 not a direct factor. We did up, increase dues this
7 year. There were a number of factors in the payment.
8 Due to the fact that at some point, we have to
9 replenish our reserves, has not necessarily yet been a
10 direct factor in dues increase."

11 So in my answer to you just now, when I said
12 that we had additional expenses, we do have some more
13 expenses for -- now, the fact we own the Creek Club.

14 Q. Okay.

15 A. That was what I was talking about, reflecting
16 in the dues increase. But the four ninety-five per se,
17 in and of itself, wasn't necessarily a factor in the
18 dues increase at this point.

19 Q. Okay. Thank you. And wasn't it represented
20 by you, to the I'On residents, that the primary
21 objective that the Assembly had throughout the
22 litigation was -- or at least at the settlement -- at
23 the trial, was to own deep water docks?

24 A. Our goal in reaching a settlement was to
25 secure ownership of the docks regardless of what

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1 happened at trial.

2 Q. Okay. And didn't you indicate to the community
3 that you got more than that, such as future income
4 streams, Creek Club access, the rights to CV-5, and the
5 ownership of CV-6?

6 A. We did get ownership of CV-6. We already had
7 some community access to the -- to the Creek Club,
8 because we contracted with them for 13 days a year.
9 What we got under the settlement agreement was
10 essentially the same 13 days a year. We increased the
11 price that we were paying per day for those 13 days,
12 but we also got a little bit of improved services.

13 In other words, the Creek Club used to make
14 us -- it was like you're on a camping trip, you have to
15 pack in and pack out your own trash. It was kind of a
16 rude way to treat customers, we thought.

17 And we said, look, you know, we'll pay a little
18 bit more, but at least you can throw away our trash and
19 we'll clean it up and put it in the trash can, but
20 leave some trash cans for us. I mean, I've been in
21 meetings where we had to go into the restrooms and pull
22 the trash cans out to throw away paper plates. So that
23 was -- that was -- we considered that a slightly
24 improved service.

25 We also negotiated that if the Creek Club had

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1 not been booked 30 days in advance, and a resident
2 wanted to rent the Creek Club for some sort of -- like
3 a family event -- something that wasn't wedding
4 related -- because, obviously, the Creek Club operators
5 didn't want us to compete with their wedding business.
6 But if you -- Uncle Harry's 80th birthday party was
7 coming up, you could rent the Creek Club if it hadn't
8 already been rented for a pretty steeply discounted
9 fee. I believe it's \$600 a night. And for a little
10 more, you could bring in your own caterer and they
11 could use a certain part of the catering kitchen -- not
12 the whole catering kitchen, but part of it.

13 My understanding is, from one of my fellow Board
14 members who daughter's got married at the Creek Club,
15 that to rent the Creek Club alone, and nothing else,
16 but just to rent the room, is probably in excess of
17 \$2000 for -- for the event, so \$600 is a pretty good
18 deal on an as available basis.

19 We also did get the right 20 years from now that
20 CV-5 will be -- will be turned over to us. And we felt
21 that that was really important, because without CV-5,
22 the use of the Creek Club for social events, even
23 community Assembly meetings, which we do have there --
24 that's one of the 13 days a year -- produces a huge
25 burden of parking on the neighborhood.

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1 Yes, we are a very walkable neighborhood, but we
2 also have a lot of older people who don't necessarily
3 want to walk from one end of our neighborhood to the
4 other, to the Creek Club, which is up in the corner as
5 you have seen on the maps. It can be a long way, so
6 people drive. They use their golf carts, and they have
7 to park some place, even for community events.

8 So we felt it just wasn't realistic to think
9 that we're going to own the Creek Club and not
10 eventually get CV-5, that that somehow could be --
11 could be split off and sold separately. That would be
12 a very bad result for the community, so that was --
13 that was important for us to secure that as well. And
14 --

15 Q. Okay. I'm not even sure what my question was.

16 A. You were asking me about things that we
17 weren't necessarily -- might not have gotten in
18 litigation and what benefits we got --

19 Q. I asked you what you represented to the
20 community --

21 A. I was trying to --

22 Q. I was asking what you represented to the
23 community --

24 A. Well, I -- I was trying to say what I
25 represented to the community.

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1 THE COURT: Okay. We need to not talk at the same
2 time --

3 A. I'm sorry, Your Honor.

4 THE COURT: Let Mr. Duffy ask a question, and then
5 answer that question.

6 BY MR. DUFFY:

7 Q. I'm going to hand you a document that -- you
8 tell me if you know what that is, please.

9 A. Yes. This looks like Tom Graham printed out
10 an e-mail blast that was sent out from the Assembly
11 Board to the community after we were allowed to
12 announce the terms of the settlement agreement.

13 Q. Okay. Let's see. And so are you with me --
14 I'm going to go to the next to the last paragraph --
15 can you tell me if I read this correctly: "Over the
16 past year, based on community opinion, the Assembly
17 Board concluded that the primary objective is to
18 achieve a settlement of our litigation with perpetual
19 ownership of the deep water docks. After long and
20 careful consideration and negotiation, the Board feels
21 that this settlement achieves that goal and avoids a
22 risk of an unfavorable trial outcome, as well as a
23 lengthy uncertainty and costs in the event of appeals".
24 Then you say, "the half million dollar purchase of
25 property sold five years ago for over \$1.3 million

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1 represents a significant value to the I'On community";
2 did I read that part correctly?

3 A. Yes, you did.

4 Q. And you continued: "A summary of additional
5 terms of this settlement, including future income
6 streams, rights to lot CV-5 (the overflow parking lot),
7 and the 275 (adjacent to the Creek Club), as well as
8 Creek Club access for I'On residents, are detailed in
9 the confidential terms sheet" -- did I read that
10 correctly?

11 A. Yes, you did.

12 Q. Okay. Now, I'm going to hand you another
13 document and ask you if you are familiar with that?

14 A. Yes, I am.

15 Q. And is it a -- a -- basically a text of
16 something that you announced at a Town Hall forum?

17 A. We had a Town Hall forum in June of this year,
18 and these are my notes from my comments to the
19 community.

20 Q. And is it fair to say, you delivered a message
21 consistent with those notes?

22 A. Yes, it is.

23 Q. And if you -- unfortunately, the notes are not
24 numbered, but let me show you where I'm looking.

25 A. I always pray that I don't drop all my papers

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1 when I'm doing --

2 Q. Yeah. You see "I would like to update you on
3 Creek Club litigation"?

4 A. Yes.

5 Q. Okay. That's where the discussions start.
6 But what I want to do is look at the bottom paragraph,
7 where it begins "under the settlement"; do you see
8 that?

9 A. Yes.

10 Q. Okay. And was your message to the community,
11 that "Under the settlement, the Assembly purchased the
12 Creek Club for \$495,000, and leased it back to 148
13 Civitas to operate as a wedding venue. Under the lease
14 terms, we have capped the number of weddings;
15 restricted dock closures; improved parking access for
16 boaters; created a revenue stream for the Assembly
17 based upon dock closures, beginning in 2015; improved
18 the services available to the Assembly, Potluck Dinner
19 Group; and provided for substantially discounted rental
20 rates for I'On residents to hold special events at the
21 club on a space available basis"; did I read that
22 correctly?

23 A. Yes.

24 Q. "In addition, the Assembly will receive at no
25 additional cost, ownership of lot CV-5, the overflow

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1 parking lot, at the end of the first lease term, and
2 has a right of first refusal on lot 275, the
3 residential lot next to the Creek club, along the Marsh
4 Path"; did I read that correctly?

5 A. Yes, you did.

6 Q. And then you indicate -- did you indicate to
7 the community that you are, in fact, supporting the
8 plaintiff's claims against the defendants now?

9 A. Yes.

10 Q. And that includes new claims that -- allegedly
11 for damages that arise from the settlement; is that
12 right?

13 A. That's correct.

14 Q. And you've never refused to take any action --
15 or the Board has never refused to take any action that
16 the plaintiffs have asked you to do on those new
17 claims, have you?

18 A. They haven't asked us to do anything that I'm
19 aware of, so we haven't refused anything.

20 Q. Has the Board ever refused demands by the
21 plaintiffs to bring suit about the issues in this suit?

22 A. As far as I know, the plaintiffs have never
23 asked the Board to bring suit. So, no, we have never
24 refused.

25 Q. I know you started in 2010, but are you

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1 familiar with the practice, if it still exists, of
2 sending out proposed budgets in advance of annual
3 meetings?

4 A. Yes. At the point they are sent out for the
5 annual meeting, they are no longer proposed. They have
6 been approved by the Board. They are voted on by the
7 Board, and not the Assembly.

8 Q. I understand. And they're sent out to every
9 resident at I'On?

10 A. Every address that we have, yes.

11 Q. Has that been a practice for a long time?

12 A. As far as I know, I've seen -- I've certainly
13 seen past copies of those, yes.

14 Q. Now, when you went back and were investigating
15 what had happened that led up to the lawsuit, you were
16 familiar with an offer to sell the Creek Club and docks
17 out at the Creek Club to the Assembly in 2007; is that
18 right?

19 A. I think it was -- I'm not sure actually at
20 this point, I think it was Ed Clem who told me about
21 that, that there was an offer to purchase that was
22 accompanied by the promise to give us the money to make
23 the purchase. So, in effect, it was -- I don't know
24 why they were going to go through paper work, but they
25 were going to give \$700,000 and they were going to sell

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1 it to us for \$700,000, so obviously it was a wash.

2 Q. Okay. And is it accurate that a lot of --
3 there was a lot of different opinions on whether the
4 Assembly should, in fact, take ownership of the
5 community docks on the civic lot six?

6 A. That's what I was told, but I -- I didn't move
7 to I'On until very late in 2007, so I was totally
8 unaware of any of this going on at the time.

9 Q. From your investigation, when you wanted to
10 report to the community the history of events, that was
11 your understanding?

12 A. Yes. That's what I was told.

13 Q. Now, is it your position today that it's
14 absolutely no question, that in the 1998 Property
15 Report, the defendant, I'On Company, promised exactly
16 the docks that are now a part of the Creek Club?

17 A. No. I don't think there's any question about
18 that at all. I think that's been made pretty clear
19 here this week.

20 Q. Okay. Did you not, in your 1998 -- I'm
21 sorry -- did you not in your -- in your address to the
22 Assembly, before trial was scheduled the first time,
23 state that the I'On Company quote "did not promise the
24 Creek Club or a particular dock or a deep water dock"?

25 A. If you could put the text in front of me, I

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1 could refresh myself on that. But offhand, I don't
2 recall my exact words. I'm sorry.

3 Q. Do you recall preparing this special meeting
4 of the Assembly presentation?

5 A. Yes, I do.

6 Q. Okay. I'm going to look at page five, please,
7 Ms. Bedell. Okay. Do you see where it says "a
8 history of the Creek Club property"?

9 A. Yes, I do.

10 Q. Okay. And I'm going to start reading from "as
11 we'll see" -- do you see where I am?

12 A. Yes.

13 Q. "As we'll see when we outline their case, the
14 plaintiffs allege that the I'On Company made
15 representations as early as 1998, that upon completion
16 of the construction, a quote, Creekside Park and a
17 quote, community docks" -- although it says plural
18 there -- "would be turned over to the Assembly at no
19 cost as a community amenity"; did I read that
20 correctly?

21 A. Yes.

22 Q. And continuing on, "it did not promise the
23 Creek Club a particular dock or a deep water dock", did
24 I read that correctly?

25 A. Yes, you did.

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1 MR. EVANS: Your Honor, could they read the next
2 sentence to put it in context, please.

3 THE COURT: Sure.

4 BY MR. DUFFY:

5 Q. Well, your presentation was that a turnover
6 never happened and that broken promise is what's at the
7 heart of this lawsuit; do you see that?

8 A. Yes, I do.

9 Q. Okay. Now, you're telling us that they didn't
10 promise the Creek Club, and they didn't promise a
11 particular dock, or a deep water dock, right?

12 A. I was referring in that context to the HUD
13 statement of 1998; and the Creek Club certainly was not
14 mentioned in that document.

15 Q. Okay. And neither was a particular dock or a
16 deep water dock, right?

17 A. Not in those terms, no.

18 Q. Thank you.

19 A. In that document.

20 Q. Right. Now, recently at my office, you
21 testified that the I'On Company obligated -- was
22 obligated to construct a building on CV-6 and convey
23 the building to the Assembly free of charge; do you
24 recall that?

25 A. I remember the first part, I'm not so sure

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1 about the second. Could you point me in the right
2 direction?

3 Q. Page nine of your deposition. Okay. I say on
4 line 15: "Do you contend that any defendant was
5 obligated to construct a building on the property you
6 referred to, and convey along with the property a
7 building to the Assembly free of charge?"

8 A. Yes, I see that now, and I did said that.

9 Q. Now, we looked at what you said in January of
10 2013, that they didn't promise the Creek Club; is that
11 right?

12 A. Yes. And since that time, as I referred to in
13 my deposition, I learned about the agreement with Olde
14 Park, which is what -- you asked me what the basis of
15 my contention last month was, and I said it was the
16 agreement with Olde Park.

17 Q. Right. Your suggestion was not that any
18 defendant promised the Assembly to build the Creek
19 Club, your suggestion was, well, they promised, we're
20 obligated to build the Creek Club because they said so
21 to Olde Park --

22 A. Well, you asked me --

23 THE COURT: Ma'am.

24 Q. So then that meant that, yes, they were
25 obligated to convey the Creek Club to the Assembly?

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1 A. What I said was, they were obligated to build
2 the building, which was the answer to the question that
3 you asked me. And then I said that when you have a
4 parcel and you agree to convey the parcel, if you built
5 a building on the parcel, then you're going to have to
6 convey the building along with the parcel; and so that
7 just seemed logical to me. They had gone ahead and
8 built the club on that parcel, and they obligated
9 themselves to turn over that Creekside Park, and that
10 was on the Creekside Park.

11 Q. Let's look at your first deposition, page --
12 do you have that?

13 A. No, I don't have the first one, I'm sorry.

14 Q. This is January 30, 2013.

15 A. Okay. Thank you.

16 Q. Okay. I'm going to look at page 65 of that
17 deposition, Ms. Bedell. And I'm on line 16; are you
18 with me?

19 A. Yes.

20 Q. Okay. "Are you aware of any representations
21 to the contrary since then, that the Assembly is
22 somehow obligation" -- I started too early. I
23 apologize, but I'll continue. "Are you aware of any
24 representation to the contrary since then that the
25 Assembly, I'On Assembly is somehow obligated to

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1 purchase the Creek Club"? And your answer was: "I'm
2 not aware of any such representation?"

3 A. That's correct.

4 Q. Okay. Then my question is: "Are you aware of
5 any representation by any of the I'On defendants or
6 anyone else, for that matter, that the Creek Club is to
7 be conveyed to the Assembly at any point?" And what is
8 your response to that?

9 A. "I'm not aware of any such representation."

10 Q. Okay.

11 A. Which was accurate at the time I made the
12 statement.

13 Q. Right. And you had seen the 1998 Property
14 Report, right?

15 A. Yes and -- again, my contention was based on
16 the fact that they made a representation or promise to
17 Olde Park to build a building, promised to convey the
18 property to us. The building was on the property. You
19 can't just lift it off and move it away.

20 Q. So your contention is that they had promised
21 CV-6 -- is that what your contention is?

22 A. That's the Creekside Park.

23 Q. Okay. Let's look at Defendant's Exhibit 31,
24 please. Do you have that? I told you I would give you
25 something back.

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1 A. Number 31 you said?

2 Q. Thirty-one, please. Okay. Have you seen
3 Defendant's 31 before?

4 A. Yes, I believe I have.

5 Q. And is it -- let's highlight the first
6 paragraph, please, Lea Ann. Now, at the top, Ms.
7 Bedell, you see it's March 10, 2009; is that right?

8 A. The date of the letter, yes.

9 Q. And it's -- Mr. Bouch, the Assembly's lawyer,
10 writing to Ms. Adkins; is that right?

11 A. Yes.

12 Q. And, in fact, responding to her letter, which
13 we've seen?

14 A. Yes.

15 Q. And he intends to be providing the opinion of
16 the Assembly Board; is that right?

17 A. That's correct.

18 Q. Let's look at the next sentence, please, Lea
19 Ann. He says "Insofar as the pending sale of the Creek
20 Club" -- which, would you agree, that is CV-6?

21 A. Yes.

22 Q. "It is the understanding of the Board that the
23 sale will not include items which were intended to be
24 or are the property of the I'On Assembly"; did I read
25 that correctly?

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1 A. Yes.

2 Q. Now, in your presentation after reviewing
3 things for the -- before the first trial, January 23,
4 2013, did you describe the Board's action at this time
5 as acting with a laser focus on the Assembly's
6 interests?

7 A. Yes.

8 Q. Okay. Now, is it your understanding that Mr.
9 Bouch or Mr. King, or whoever it was with the Assembly,
10 was thinking you still may get the docks at this point?

11 A. I believe that the evidence this week has
12 shown that Chad Besenfelder was actually telling Bruce
13 just exactly that, we are going to deed you over the
14 docks.

15 Q. Okay.

16 A. So that when Tim said -- Tim Bouch said, they
17 are not going to sell anything that's the property or
18 that's owed to the Assembly, he said that with the
19 understanding that the docks were to be carved off.

20 Q. Right. And that laser focus meant CV-6 is not
21 ours and wasn't supposed to be ours; is that right?

22 A. Based on what Bruce knew at the time, that was
23 probably a reasonable thought.

24 Q. In fact, his lawyer thought so, right?

25 A. I don't know at this point -- at that point in

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1 time, I don't know how much time or opportunity or
2 documents were available to Tim for reviewing.

3 Q. Well, certainly the '98 report was available,
4 it had been sent to Mr. Kinney by Ms. Templeton by
5 then?

6 A. And I've already said, that that didn't refer
7 to the Creek Club -- the building itself.

8 Q. Did you understand when you did your
9 investigation, that it was clear that most residents
10 never received or relied on the same 1998 Property
11 Report that was at the heart of this case?

12 A. It was certainly not clear how many residents
13 had received the 1998 report at that time.

14 Q. Well, was it clear most did not?

15 A. If that's what I said, I may have concluded
16 that at the time.

17 Q. Well, you can check it if you like.

18 A. Okay.

19 Q. It was your presentation on January 23rd, page
20 32.

21 A. I said "It's unclear how many residents are
22 similarly situated because many of them never got the
23 same documents the plaintiffs got". So, again, the
24 number is unclear how many is many. We didn't know at
25 the time.

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1 Q. Okay. Let's look at page 22. I'm going to
2 read the next to the last paragraph, you tell me if I
3 read it correctly, please. "In addition, it's clear
4 that many residents never received or relied on the
5 same Property Report that the plaintiffs received. So
6 on that basis, they would not stand in the same legal
7 shoes as the plaintiffs. And, therefore, don't have
8 the same legal rights that the plaintiffs are
9 asserting."

10 A. Yes, you read that correctly.

11 Q. Okay. And back to page 32. Do you see where
12 it begins "realistically" on the first -- the top
13 paragraph; are you with me?

14 A. Yes, I see that.

15 Q. Okay. And you indicated "Realistically most
16 residents -- most residents simply do not have the same
17 legal basis for a claim that the plaintiffs have. But
18 even more clearly, the Assembly does not have a basis
19 for a claim"; did I read that correctly?

20 A. Yes. And that's because our understanding of
21 the plaintiff's claims at that time, were that they
22 were based on representations and promises made to
23 buyers of property. The Assembly never bought any
24 property, so we could not sue as a buyer of property
25 who had been the recipient of a broken promise, and

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1 that was what that referred to.

2 Q. Thank you, Ms. Bedell. You're telling me
3 that -- do you recall a discussion of what damages you
4 would contend the Assembly suffered as a result of
5 what's alleged in this lawsuit?

6 A. Yes.

7 Q. And you essentially -- you had a number that
8 was millions of dollars essentially, echoing what the
9 plaintiffs had provided?

10 A. Roughly, two and a half million, or a bit
11 north thereof, yes.

12 Q. Now, do you agree with me that as far as this
13 calculation under the lease, the Assembly could buy out
14 the final two terms of the lease, which would be
15 considered as damages; that it's impossible to say
16 whether the Assembly, at that point, would buy -- would
17 choose to buy out the options?

18 A. Well, it's impossible to say because it has to
19 do with our limited borrowing capacity. But if we
20 don't borrow it, then we're encumbered for another
21 either five or ten year lease extension, so there would
22 be some value to that encumbrance or some burden to us
23 for that encumbrance as well, just as there is a value
24 to the 20 year lease encumbrance that we currently
25 have.

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1 Q. Okay. Let's look at Plaintiff's 225, please.
2 Let's start at paragraph 7. Do you recognize this as
3 the settlement agreement, Ms. Bedell?

4 A. I do.

5 Q. Okay. Do you see where it says "The rights of
6 Olde Park residents to use the I'On boating facilities
7 shall be protected by a document to be negotiated"; is
8 that right?

9 A. That's correct.

10 Q. Okay. And the rights of Olde Park residents
11 have been recognized all along from the I'On Club; is
12 that right?

13 A. To the extent that we have been acting as if
14 the easement is valid, yes, we recognize any legal
15 rights that the Olde Park residents may have.

16 Q. Is there any extent that you -- that the Board
17 ever acted as the easement was not valid?

18 A. Absent a court judgment, that would be a very
19 risky strategy for us to follow, so they could end up
20 suing us.

21 Q. So that's a no?

22 A. Yeah, the answer is no.

23 Q. Always operated under the easement, correct?

24 A. We have.

25 Q. Now, let's look at the last sentence -- no --

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1 no, I'm sorry. Same paragraph, last sentence. The
2 parties will cooperate in confirming the invalidity of
3 the easement; do you see that?

4 A. I do.

5 Q. And, in fact, that's what you were telling me
6 that maybe it's invalid?

7 A. That's right.

8 Q. Right?

9 A. We --

10 Q. We've always been operating under it, but now
11 you're suggesting it might be invalid; is that correct?

12 A. That's correct.

13 Q. That was part of the deal you struck for the
14 Assembly in Exhibit 225; is that right?

15 A. We've always believed that it's not really an
16 arm's length transaction; that it certainly was adverse
17 to the interest of the Assembly. That had we been
18 independently represented, we never would have signed
19 that kind of an agreement. It's extremely one-sided.
20 And the idea that one guy signed it for three different
21 companies or three different organizations, I mean,
22 it's laughable. But, you know, we are the stewards of
23 our homeowners' dues, and we're obligated to spend them
24 wisely. As long as we were getting reasonable
25 cooperation, it was working out reasonably well. I

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1 know lawyers, you don't like to hear this, but we don't
2 run off to court to resolve a dispute. We -- we work
3 -- it was sort of a live and let live.

4 Once we were embroiled in this litigation
5 against our will, and the opportunity came to say, you
6 know, we really think that this easement is invalid,
7 that we shouldn't be bound by it; then, you know, in
8 for a nickel, in for a dollar. So here we are.

9 Q. Ms. Bedell, didn't your counsel represent to
10 the court that it was going to be perpetual, the
11 easement was perpetual?

12 A. If he did, I wasn't here that day. I can't
13 say that. I haven't seen a transcript and I really
14 cannot testify as to what my counsel may or may not
15 have said. I'm -- I'm sorry --

16 Q. You testified the last time you were aware of
17 it. We can go to that if you'd like.

18 A. I believe that's what the judge was referring
19 to earlier today when she said the transcript was
20 muddled.

21 THE COURT: Ma'am, you need to answer the
22 questions that he asks you and wait for a question --

23 THE WITNESS: I'm sorry, Your Honor.

24 THE COURT: -- to be posed and not suggest what
25 you think the judge said.

D. BEDELL -- DIRECT BY MR. DUFFY

1 A. I'm sorry, Your Honor.

2 MR. DUFFY: Thank you, Your Honor. I think that's
3 clear enough.

4 BY MR. DUFFY:

5 Q. Now, let's look at that exhibit again, the
6 same 225, please, Lea Ann, let's look at paragraph
7 nine. Okay. Do you see the bottom sentence, Ms.
8 Bedell, that "The Assembly will instruct its attorneys
9 at trial to support the plaintiff's case against the
10 I'On defendants, and shall cooperate with the
11 plaintiffs in prosecution of this case"?

12 A. I said that, yes.

13 Q. That was part of this deal that you entered
14 into on behalf of the Assembly; is that right?

15 A. That's correct.

16 Q. Okay. Now, in fact, you did just testify that
17 you believed that there were millions of dollars in
18 damages to the Assembly; is that right?

19 A. I do.

20 Q. Okay. Now, your position right here for the
21 first trial, before anything else significant happened
22 in the litigation, except for this agreement, where you
23 agree to support the plaintiffs, was that you weren't
24 aware of any damages that the Assembly had suffered; is
25 that right?

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1 A. I -- if you could refer me to where I might
2 have said that, I don't recall saying we were -- had no
3 damages.

4 Q. Let's look at your first deposition. Do you
5 have it with you, ma'am?

6 A. This one, yeah, I'm sorry.

7 Q. Okay. Page 55, please, I'm on line 11. Are
8 you there?

9 A. I'm sorry, with four pages on a page, it's
10 hard to. Okay. Hold on.

11 Q. Page 55.

12 A. Yes.

13 Q. "Do you have any knowledge or information
14 regarding the Assembly's damages resulting from acts
15 and omissions alleged in the second complaint?" Your
16 answer: "Whether the Assembly has suffered any damages
17 based on the allegations of the complaint?"

18 Question: "Yes."

19 Answer: "I have no knowledge of any damages";
20 did I read correctly?

21 A. You did. And at that time, that was an
22 accurate answer. If you refer to my answers as to what
23 damages we have incurred, those are damages that were
24 all incurred subsequently to this deposition.

25 Q. So not getting what you contended was the

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1 community docks promised to the Assembly, and not
2 getting the Creekside Park promised to the Assembly,
3 there was no damages before the first trial; is that
4 what you are telling me? It was just something that
5 came out of this agreement you entered is what caused
6 the damages?

7 A. No. The damages that tend to be incurred by
8 the kind of broken promises that are made to
9 purchasers, is that purchasers didn't get what they
10 anticipated getting. The damages to the Assembly,
11 since we weren't buyers, are not necessarily measured
12 the same way.

13 Q. Was the property -- do you contend the
14 property, in the 1998 Property Report, was promised to
15 be deeded over to individuals or to the Assembly?

16 A. It was promised to be -- it was promised to
17 the individuals that it would be deeded to the
18 Assembly.

19 Q. Okay. Thank you.

20 THE COURT: Okay. Thank you. If I could ask
21 y'all to move that easel, I'm having trouble --

22 MR. DUFFY: I'm sorry.

23 THE COURT: And, ladies and gentlemen, you all
24 made a wise decision to stay a little later today. We
25 are under a flash flood warning until 7:30. There are

D. BEDELL -- CROSS BY MR. BOUCH

1 some streets closed, but apparently it's clearing up.
2 So maybe by the time we finish with this particular
3 witness, it will be a little better. I figured that's
4 what you were poking your head in here to let us know.
5 Okay. All right.

6 MR. BOUCH: Your Honor, may I take a matter up
7 with you for five seconds?

8 THE COURT: Sure.

9 (WHEREUPON, a side bar was held.)

10 THE COURT: I believe we introduced you, Mr.
11 Bouch, at voir dire --

12 MR. BOUCH: Yes, ma'am.

13 THE COURT: -- on Monday with Mr. McLeod. They
14 are both here on behalf of the Assembly. Since he is
15 the Board President, he is going to ask her a few
16 questions as well, and then we'll have cross
17 examination.

18 MR. BOUCH: Thank you, Your Honor.

19 THE COURT: Sure.

20 **CROSS EXAMINATION BY MR. BOUCH:**

21 Q. Ms. Bedell, good afternoon. I just have two
22 or three questions. Has the Assembly Board ever
23 authorized me or any lawyer to file a lawsuit such as
24 has been brought against the defendants in this case?

25 A. No, we have not.

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1 Q. Why not?

2 A. Because at the -- at the time that an
3 opportunity might have arisen to file a lawsuit, based
4 on what we knew at the time, we did not -- we were not
5 in a position to file a lawsuit.

6 Q. Okay. Is there anything in the -- in the
7 controlling documents that would have prevented you
8 from filing a lawsuit?

9 A. Well, as has been mentioned several times, the
10 founder retains veto power. And Tom Graham testified
11 that that veto power is very narrowly restricted.
12 However, it's pretty clear that at least one of those
13 narrow restrictions is that the founder retains the
14 right to veto anything -- any action that the Board
15 might take that's contrary to the interest of the
16 founder. Clearly, our suing the I'On company would be
17 contrary to his interests, and we -- we would be
18 potentially subject to veto.

19 Q. So if the Board wanted to sue the I'On
20 Company, it would be vetoed?

21 A. I believe it would be.

22 Q. Was that one of the reasons that you decided
23 not to -- that you never authorized me to file a
24 lawsuit?

25 A. I believe so, yes.

D. BEDELL -- CROSS BY MR. EVANS

1 Q. Okay. Mr. Duffy asked you about whether the
2 lawyer for the Assembly, me, made a representation that
3 the easement was perpetual; do you remember that?

4 A. Yes. I remember him asking me that, yes.

5 Q. Okay. All right. At the time that
6 representation was made, did the Assembly have any
7 ownership rights in the dock -- in the docks?

8 A. No, we did not own it at all.

9 Q. Okay. So the only thing we could have, if it
10 was valid, was the easement?

11 A. That's correct.

12 MR. BOUCH: That's all the questions I have.

13 THE COURT: Thank you. Okay. Let Mr. Lucey cross
14 and then Mr. Duffy will be able to redirect -- or, I'm
15 sorry, Josh Evans.

16 **CROSS EXAMINATION BY MR. EVANS:**

17 Q. Ms. Bedell, you understood that Mr. Kinney's
18 efforts to negotiate an amended agreement with Mr.
19 Russo, prior to the sale of the property, were refused
20 by Mr. Russo, correct?

21 A. My recollection is that what Bruce told me was
22 that he and Mike had sort of initialed an agreement in
23 principle, but at some point the discussion stopped,
24 and he refused to go any further.

25 Q. Likewise, Mr. Kinney's efforts to get help

D. BEDELL -- CROSS BY MR. EVANS

1 from Mr. Graham -- Mr. Tom Graham after that discussion
2 with Mr. Russo didn't go anywhere, those were refused
3 as well?

4 A. Well, I think we saw an e-mail from Tom saying
5 the easement will not be amended while it's under
6 contract for sale.

7 Q. And that's not the first time that the I'On
8 Assembly has had problems with the developer, correct?

9 A. Oh, goodness no.

10 Q. Tell us about some of the other problems that
11 the --

12 MR. DUFFY: Objection, Your Honor. That's not
13 relevant to the claims that are at issue.

14 THE COURT: Overruled.

15 A. There has been --

16 THE COURT: Briefly. Briefly.

17 A. Okay. Well, I'll focus on the most recent
18 ones, and that is the -- the insistence by Vince Graham
19 that they revert to appointing a member to our Board.
20 We advised -- I'm sorry --

21 BY MR. EVANS:

22 Q. Let's just stop there. And tell me about the
23 next one?

24 A. We've had debates over control of the I'On
25 design committee, which is our architectural review

D. BEDELL -- CROSS BY MR. EVANS

1 board, that we felt it was time for us to take control
2 over it. And that, in fact, the I'On Company had been
3 running it in a somewhat snip-snide manner to advance
4 their own interests in selling property, and we felt
5 that that was inappropriate.

6 Q. And did Mr. Vince Graham tell you why, that he
7 didn't want to hand over control of the I'On design
8 committee?

9 A. Yes. In a very insulting and condescending
10 manner, he said he was concerned that the -- that the
11 Assembly, if we were in charge of the IDC would go "all
12 brown shirt", quote/unquote on residents, trying to
13 build or modify their homes.

14 Q. What did you understand that to mean?

15 A. I took it as a really offensive -- a reference
16 to basically calling the Board nazis or racists.

17 Q. Had you had any problems with the developer
18 with regard to amenity turnover, being other parcels of
19 the property?

20 A. Well, you know, the Grahams have never met a
21 deadline that couldn't miss. You saw it, there was a
22 reference earlier to turnovers on phase VII, IX and
23 X -- pieces of VII, IX and X. Those references dates
24 from either 2008 or 2009. I think we got the deeds to
25 those parcels recorded this year, so that's five years

D. BEDELL -- CROSS BY MR. EVANS

1 later. I -- I -- that began while I was on the Board,
2 I think maybe even -- no, the first full term that I
3 was on the Board. It's been going on for years trying
4 to get those pieces turned over.

5 Q. You mentioned the invalidity of the
6 recreational easement when you were discussing things
7 with Mr. Duffy, is it your understanding that the
8 recreational easement is invalid because the company
9 was giving away the rights -- didn't actually have any
10 rights to give away?

11 A. Among other grounds, yes.

12 Q. And lastly, Ms. Bedell, is the Assembly part
13 of a Free Civic Lot Gang?

14 A. I have never heard of that until Mr. Duffy's
15 opening statement.

16 Q. Is the Assembly doing Mrs. Templeton's
17 bidding?

18 A. I've never even met Catherine Templeton. I
19 sort of know who she is by reputation, because
20 apparently she is now a state official. But I have no
21 idea who she is other than that.

22 Q. And is the Assembly doing Mr. Brock's bidding?

23 A. I met him once at Starbucks. That's my only
24 acquaintance with Mr. Brock.

25 MR. EVANS: Thank you, Ms. Bedell.

D. BEDELL -- REDIRECT BY MR. DUFFY

1 THE COURT: Okay. Mr. Duffy?

2 MR. DUFFY: Thank you, Your Honor.

3 REDIRECT EXAMINATION BY MR. DUFFY:

4 Q. MS. Bedell, you had some discussions with Mr.
5 Bouch about the easement representations to the court,
6 and that at the time the Assembly didn't have any
7 rights other than the easement to the dock --

8 A. We had no ownership rights; that's correct.

9 Q. Did the easement change between then and now?

10 A. No. It has never changed.

11 Q. Okay. So it's just the Assembly's
12 interpretation of whether its valid or what it means,
13 that's changed between --

14 MR. BOUCH: Your Honor, I believe he's asking a
15 question of law. The easement merged when we took
16 ownership of the property.

17 THE COURT: The proper way to do that is say
18 "objection".

19 MR. BOUCH: Objection, Your Honor..

20 THE COURT: It's overruled. Thank you.

21 MR. DUFFY: Thank you, Your Honor.

22 BY MR. DUFFY:

23 Q. Ms. Bedell --

24 A. And if I could clarify my response on that,
25 Mr. Duffy, I apologize. The easement is no longer

D. BEDELL -- REDIRECT BY MR. DUFFY

1 valid with respect to the Assembly's rights to the
2 property because we own it. And you can't have an --
3 you can't have an easement to property that you own.
4 So after the settlement agreement and the deed, that
5 became invalid.

6 Q. I don't think we want to go through all these
7 details in this discussion, but there are other things
8 in that easement agreement, would you agree with me,
9 more -- the easement agreement is still a valid
10 document; do you disagree with that?

11 A. Yes, I do.

12 Q. Okay. So the I'On Club's easement rights back
13 and forth with the Assembly, that are also part of that
14 document, you don't recognize that to be valid any
15 more?

16 A. No, I don't. I mean we -- as I said, we have
17 been treating -- until we get a court ruling that
18 officially it is not valid, then we have to -- out of
19 some sort of, you know, respect and fair dealing, we
20 have to deal with it. We can't just sort of thumb our
21 nose at it, so we haven't been.

22 Q. Okay. Was the -- was the easement -- did you
23 tell anyone that the easement was invalid or not
24 perpetual right before the first -- right before
25 January of this year, did you tell anybody that?

D. BEDELL -- REDIRECT BY MR. DUFFY

1 A. Did I tell anybody?

2 Q. Did you represent -- are you familiar with
3 anybody from the Assembly representing to the court
4 that the easement was invalid or wasn't perpetual?

5 A. I -- as I said, there was apparently some
6 statement made by our attorney. I believe I was not in
7 the court when those statements were made, and I can't
8 really testify as to what he said.

9 Q. I'm asking you, are you aware of anyone saying
10 differently; that it is -- are you aware of any
11 representation by the Assembly -- are you directing
12 anyone to make the representation that that easement is
13 not valid, and that that easement is not perpetual
14 before the deal in 225 -- put that up Lea Ann -- before
15 the deal in 225; did you ever tell anyone to suggest
16 that to a court?

17 A. Did we -- there was -- so far as I know, there
18 was no opportunity to suggest that to a court. I
19 believe I became familiar with some of these issues,
20 listening to Mr. Lucey's presentation in the mediation
21 session. At the time, for example, I had not been
22 aware that when the I'On Club granted the easement, it
23 didn't even own the property. And I believe I may have
24 made that point in my presentation to the community, so
25 there is some issue there.

D. BEDELL -- REDIRECT BY MR. DUFFY

1 We always knew that it was signed by Joe Barnes
2 on behalf of everybody and his sisters and his cousins
3 and aunts. But -- and we always knew that there was a
4 problem with the -- we knew for some time that there
5 was a problem between the perpetual term and the
6 termination term.

7 Q. Okay. Prior to this statement that the
8 parties will cooperate in confirming the invalidity of
9 the recreational easement, had the Assembly ever
10 cooperated with the plaintiffs to suggest or agree that
11 it was invalid?

12 THE COURT: Yes or no?

13 A. I'm just trying to think of what the right
14 answer is, Your Honor. I'm sorry, Mr. Duffy, would you
15 repeat the question for me?

16 Q. Prior to entering this agreement, which you
17 agreed on behalf of the Assembly to cooperate and
18 confirming the invalidity of the recreational easement,
19 have you ever been part of an effort to confirm the
20 invalidity of easement?

21 A. No.

22 Q. Okay. Now, you were talking about doing
23 the -- I'm sorry. You were talking about a problem
24 with control being exercised by the I'On Company; do
25 you recall that?

D. BEDELL -- REDIRECT BY MR. DUFFY

1 A. Yes, I do.

2 Q. And one of the things you cited was that they
3 had put Chad Besenfelter on the Board without being
4 voted on -- they put him on the Board?

5 A. That's right.

6 Q. Okay. Now, Chad has been excluded by you and
7 the rest of the Board on any decisions that relate to
8 potentially -- being adverse to the I'On Company; is
9 that correct?

10 A. He has refused to sign our conflict of
11 interest policy. But, yes, we exclude him from
12 decisions.

13 Q. Has he affected any decisions the Board
14 makes -- that relate to the I'On Company?

15 A. No.

16 Q. Okay. Now, the design committee you
17 discussed, does that make any decisions about whether
18 to bring suit or how to spend money of the Assembly?

19 A. If we had a problem with an enforcement of a
20 decision of the I'On Design Committee; then, yes, that
21 would -- that could potentially involve enforcing a
22 fine or a lien or something against somebody's
23 property. As against the I'On Company -- I'm sorry --
24 I may be misunderstanding your question.

25 Q. The Design Committee doesn't control the

D. BEDELL -- REDIRECT BY MR. DUFFY

1 Board, the Board of Trustees control the Assembly; is
2 that right?

3 A. We do now.

4 Q. Well, has the Design Committee ever run and
5 made major decisions on behalf of the Board for the
6 Assembly or for the Assembly generally without the
7 Board's input?

8 A. No.

9 Q. Okay.

10 A. That's not their job.

11 Q. Right. Now, I want to look at -- no, well,
12 let's see, you -- you were discussing that you thought
13 that there were problems with control by the I'On
14 Company, that related to you not bringing suit; is that
15 right?

16 A. Yes.

17 Q. Okay. I want to look at your first
18 deposition, please. Do you have it with you still?

19 A. Yes.

20 Q. Do you remember this is the one before the
21 first trial was scheduled, before the agreement -- I'm
22 at page 22. I'm on line 3. "I will represent to you
23 that there have been allegations in this suit that the
24 Grahams or the developer still maintain a large control
25 over the Board; does the Board agree with that

1 statement"?

2 After objections, the answer was: "I certainly
3 don't, personally. I can't speak for the rest of the
4 Board". Did I read that correctly?

5 A. You did.

6 Q. Lea Ann, please put up 225, paragraph nine.
7 Ms. Bedell, there is a question about whether you were
8 doing the bidding for Mr. Brock; is that right? And
9 you said "no"?

10 A. Yes.

11 Q. Okay.

12 A. Yes, I said "no". I'm sorry.

13 Q. So you agreed to do the bidding of the
14 plaintiffs in this case; is that right?

15 A. We agreed to support the plaintiff's case
16 against the defendants, and agreed to cooperate with
17 them in the prosecution of the case.

18 MR. DUFFY: Thank you, Ms. Bedell.

19 THE COURT: Okay. Anything further?

20 MR. EVANS: Nothing, Your Honor.

21 THE COURT: Anything further, Mr. Bouch?

22 MR. BOUCH: Nothing, Your Honor. Thank you.

23 THE COURT: All right. Ma'am, you may step back
24 to the table.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: And we have another one in the morning
2 ready to go, correct?

3 MR. DUFFY: Yes, ma'am.

4 THE COURT: Okay. All right. Ladies and
5 gentlemen, I'm going to let y'all go for the day. We
6 have a few more things we need to work on. Please be
7 back at 9:30. The attorneys are going to have to come
8 back a little bit earlier to work on jury charges,
9 because I have a feeling we will all be a little
10 clearer in the morning to be able to do that.

11 Please don't discuss anything about the case.
12 We still have some more evidence and then the closing
13 arguments of the attorneys and the charge on the law.
14 Be careful going home. Folly Road looked pretty bad,
15 right past Camp where it always floods, so hopefully
16 it's a little better by now.

17 (WHEREUPON, the jury leaves the courtroom at
18 6:33 p.m.)

19 THE COURT: Thank you. Okay. I know everybody is
20 tired and ready to go home. It's been a long day, but
21 I wanted y'all -- I've looked at the submitted jury
22 charges that have been provided by both sides. So if
23 y'all would, take a look at those either tonight or
24 early tomorrow morning. I think we probably need to
25 come back at 9:00, and at least start on those, so that

1 I can be putting the full charge together.

2 Obviously, I took out civil conspiracy because
3 that's not going to go, breach of fiduciary duty is
4 probably not going to go. I didn't see a negligence or
5 gross negligence claim in the complaint; am I right?

6 MR. LUCEY: There's a negligent misrepresentation,
7 Your Honor, and it's the plaintiff's position that can
8 be grossly validated. And I believe there's
9 allegations to support that.

10 THE COURT: All right. Well, we'll look at that,
11 but I'm not going -- there's a lot of -- I mean, y'all
12 did what I always did with jury charges, we'd go
13 through our charge book and give everything we possibly
14 had on it. I'm not going to charge everything that
15 there is possibly to charge on it. They lose track at
16 that point anyway, so try to pare those down some
17 tonight, if you can.

18 MR. WHITAKER: Your Honor, I'm sorry. If I may,
19 we may have one more -- what's the best way to get that
20 to you?

21 THE COURT: E-mail it to me. Sara is at the 95
22 year old's birthday party, so send it right -- I think
23 my e-mail has changed. I think it's now just
24 SMcDonald. All right. What else do we need take up
25 before we go today?

1 MR. LUCEY: Nothing from the plaintiff, Your
2 Honor.

3 MR. DUFFY: Nothing.

4 THE COURT: All right. Then I will see y'all back
5 at 9:00 -- does that work for you, Sharon -- I just
6 wanted to try to get this to them, so they'll have time
7 to deliberate, you know, before 11:00. This will be my
8 second late Friday verdict since June, so.

9 Anything, Mr. Bouch, you need to put on the
10 record before we go?

11 MR. BOUCH: No, Your Honor. We're at ease.

12 (WHEREUPON, the hearing adjourned at 6:45 p.m.)

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1 * * * P R O C E E D I N G S * * *

2
3 THE COURT: Good morning everybody. I have been
4 looking at what you sent me this morning. I haven't
5 made it quite through everything yet, but we can talk
6 about everything, and I will continue to review them.

7 I know we need to look at charges. My hunch at
8 what I was likely to do at the second portion of the
9 directed verdict phase, I think, generated some paper
10 work, so I'm happy to hear anything y'all want to talk
11 to me about on that.

12 My suggestion would be that we look, first, at
13 the charges that were originally sent, not the newest
14 ones that came this morning, and just go through those.
15 First, we can go through the plaintiffs and then the
16 defendants, and then we can work in the new ones.

17 Anybody have another suggestion? I'm open to
18 however y'all want to do it.

19 MR. WHITAKER: That's fine, Your Honor.

20 THE COURT: All right. Let me try to get it on
21 the screen. I'm without my law clerk this morning, so
22 we've got several things going on at once.

23 Now, I understand the defendant's last witness
24 is going to be an appraisal type witness?

25 MR. DUFFY: We do have one other issue, Your

1 Honor.

2 THE COURT: Okay.

3 MR. DUFFY: Yesterday afternoon, at the end of the
4 day, you may recall something new was presented in this
5 case, that had not been before unfortunately.

6 THE COURT: What is that?

7 MR. DUFFY: There was a waiver of the
8 attorney/client privilege by Ms. Bedell testifying as
9 to what she had directed her attorney to do and/or not
10 to do at this point, which is clearly contradictory to
11 her earlier testimony.

12 THE COURT: I was waiting on the objection to
13 that. I wasn't quite sure what had happened.

14 MR. DUFFY: Well, our -- Your Honor, we could --
15 we have several ways to address it --

16 THE COURT: Okay.

17 MR. DUFFY: -- that I would propose. One is that
18 we -- that we take a delay because we needed discovery
19 to see what has been exchanged back and forth between
20 Ms. Bedell and Mr. Bouch, and when. So we could call
21 Mr. Bouch and ask him exactly what -- when that
22 instruction was given, was it given by her --

23 THE COURT: And for the record, what was the
24 instruction that she testified about?

25 MR. DUFFY: That she instructed Mr. Bouch not to

1 file suit because the Grahams would veto it. That was
2 the suggestion. Now, whether he suggested that or she
3 suggested that, that's very -- they're suggesting that
4 that is a control issue, that they never filed suit
5 because they thought the Grahams were going to control
6 it and veto it.

7 And, so, I think that -- I don't -- I honestly
8 don't believe that's what happened. I think we are
9 entitled to find out if that's what happened, and be
10 able to present evidence contrary to that.

11 Your Honor, another way to approach it would be
12 to strike it from the record, instruct the jury not to
13 pay attention to it. Another would be -- let's see --
14 I had a few of them listed.

15 THE COURT: That's okay.

16 MR. DUFFY: All right. So we can strike it from
17 the record, tell the jury not to pay attention to it;
18 your cautionary instruction, Your Honor. The delay for
19 discovery -- if we do the striking from the record,
20 what I would like, Your Honor, is to be able to have
21 Your Honor's authority to do discovery of the file from
22 the defendants, and be able to take further -- find out
23 after the fact, if you will, is that really what
24 happened or is this going to be -- will we have newly
25 acquired evidence that's going to make that testimony

1 false, that's going to have a big impact on this trial,
2 Your Honor.

3 THE COURT: So, you mean go forward with what we
4 have today, but do discovery after it's over to see if
5 there's something we need to follow up on?

6 MR. DUFFY: Yes, Your Honor.

7 THE COURT: Well, I've never thought of doing it
8 that way, but that is one way to be efficient. You
9 know, quite frankly, it seemed like speculative
10 testimony on her part to me, because I don't even know
11 if that was real. I don't know -- is she here yet?

12 MR. EVANS: She is not.

13 THE COURT: Well, that's unfortunate.

14 MR. EVANS: She's on her way.

15 THE COURT: Okay. Let me hear from Mr. Lucey.

16 MR. LUCEY: Thank you, Your Honor. I don't think
17 the testimony was quite as was just represented.

18 THE COURT: Yeah, it pretty much was.

19 MR. LUCEY: This might be a fine line, but what I
20 recall was not an instruction from her to him, but
21 rather, did you ever instruct me and why not.

22 THE COURT: Well, I can read it. I mean we can --
23 I looked at it this morning.

24 MR. LUCEY: And I think it might be probative if,
25 in fact, we are going down this road. But --

1 THE COURT: It was cover yourself testimony was
2 what it was. That's what the whole -- that whole
3 colloquy was yesterday. I'm happy to look at it again.
4 I think it's a bit of a red herring, but if it's
5 different than what was testified to previously,
6 perhaps that's something that should have been cross
7 examined on more, but are you saying you aren't
8 entitled -- allowed to do discovery that you would have
9 needed to do to cross examination of her?

10 MR. DUFFY: Exactly, Your Honor. I brought up
11 that before this deal -- she testified there was no
12 control issue according to her, which is all I can do,
13 because I don't have the communications back and forth
14 between them to understand if that's really what
15 happened.

16 THE COURT: Okay.

17 MR. LUCEY: And if I may, Your Honor, that whole
18 line of testimony was actually very brief, was brought
19 about by a very unusual circumstance, put into issue by
20 the defendants. They moved in limine in this case to
21 exclude exhibits, I believe 112, 117, which was
22 Bedell's communication with homeowners --

23 THE COURT: Right.

24 MR. LUCEY: -- what's going on. They then used it
25 extensively -- that was, frankly, quite a surprise to

1 the plaintiff, and -- but in the interest of us getting
2 to the jury, we didn't interrupt it. And so that whole
3 foundation for the testimony, altogether, was brought
4 in by the defendants, I believe. And it was just --
5 that was just an unusual, unique situation.

6 And Your Honor knows that the -- that the
7 primary act of the prosecuting plaintiffs in this
8 matter did not elicit the testimony that he's objecting
9 to right now, that was the Assembly's private counsel.
10 We don't think actually privileged information came out
11 and we object.

12 THE COURT: Oh, no, the minute she said that, I
13 thought I can't believe she said that. I can't believe
14 nobody objected. It did.

15 MR. LUCEY: Then that would go to the court's --
16 that would go to my final point, Your Honor. There was
17 no contemporaneous objection. There was no
18 contemporaneous requests --

19 THE COURT: Well, the defense doesn't have to
20 object to what they are happy she's saying. Okay. I
21 understand this puts the plaintiffs in a bad spot for
22 the second time, really, the second trial, quite
23 frankly. But what I can't allow it to do is prejudice
24 the defense. I need to read through -- I'm going to
25 read back through -- and Sharon can pull it right up

1 for me, it wasn't long. I can look at it. We need to
2 let Mr. Bouch get brought up to speed if he needs to be
3 by Mr. McLeod. We need Ms. Bedell to be here, quite
4 frankly.

5 And, you know, worse case scenario, we send the
6 jury home today, bring them back Monday. Obviously,
7 the lady that's husband is having surgery would have to
8 be let go and we would put in an alternate, let y'all
9 do the discovery today that you need to do, and get
10 rolling again Monday. I think that's a less
11 prejudicial way to handle it, than going to the jury
12 knowing we have this specter of an issue out there.
13 But I'm certainly up for suggestions. I don't have
14 court Monday. Y'all do. So, yes, sir, Mr. Bouch?

15 MR. BOUCH: Well, Your Honor, I'm a little -- kind
16 of taken aback and I've got --

17 THE COURT: I don't know how you are possibly
18 taken aback, but I'm happy to hear from you. You
19 haven't even heard everything yet.

20 MR. BOUCH: I haven't heard anything --

21 THE COURT: Here's what happened yesterday. Ms.
22 Bedell waived the attorney/client privilege on the
23 stand. I was stunned nobody objected. Apparently it
24 was new testimony nobody had heard before. And, quite
25 frankly, it goes directly to supporting the plaintiff's

1 claim that anything Ms. Watkins and -- I apologize --
2 I'm blanking on -- Mr. Walbeck and -- Ms. Adkins and
3 Mr. Walbeck went -- tried to do with this Board would
4 have been futile, and that they approached it. It was
5 directly contrary to what Ms. Bedell had testified
6 before in her deposition, and the first the defendants
7 had heard of it, so they were somewhat caught aback.

8 MR. BOUCH: Can I ask what it is?

9 THE COURT: Mr. Duffy?

10 MR. DUFFY: Yeah. It was when you asked her
11 whether she had instructed you not to file suit against
12 the defendants because they would veto it.

13 MR. BOUCH: No, that's not what I asked her.

14 THE COURT: Okay. You know what, we are not going
15 to do this again. As you were coming in, I said I can
16 read it. We have it.

17 MR. BOUCH: I believe, Your Honor, and I'm not
18 going to -- I'll let you read it.

19 THE COURT: And I'll read it to you actually. But
20 I remember sitting here in my seat thinking, I can't
21 believe that just happened, but you know...

22 MR. DUFFY: And, Your Honor, I just want to get
23 everything out there while I'm at it --

24 THE COURT: Well, okay, I either need to let you
25 talk or I need to let Sharon find it for me. So

1 however y'all want to do it. Okay. Let's find that
2 please.

3 (PAUSE.)

4 (WHEREUPON, the testimony was read back.)

5 THE COURT: Is that how you remembered it? Is
6 that the testimony?

7 MR. DUFFY: That is the testimony in question,
8 Your Honor. And my position is that they are
9 introducing what was communicated back and forth.

10 THE COURT: Okay. Having it read back now, I
11 recall what bothered me was she, again, Ms. Bedell was
12 doing what I instructed her not to do, which was
13 testify on what she thought the other folks had
14 testified about, meaning Mr. Graham.

15 Then she speculated, and this was how it came
16 across, that it would have been vetoed. And that, I
17 think, is when I expected an objection, but there
18 wasn't one. I don't see a waiver there, but I'm happy
19 to hear argument.

20 MR. DUFFY: Your Honor, it introduced what was
21 communicated back and forth, and that's -- that's --
22 that's our position.

23 THE COURT: The instruction -- the one thing that
24 could have been a waiver, as I saw it, was did you ever
25 instruct me or why did you do this. It's very close,

1 but I'm not sure that it quite gets us there, but I'm
2 happy for y'all to argue -- I want you to protect your
3 record.

4 MR. DUFFY: Your Honor, I mean, I think -- I think
5 it's clear, you know, what was said. And whether that
6 introduces the communications among the attorney and
7 the witness that, of course, had never been subject to
8 discovery, or waiver or what reasons were ever given
9 one way or the other for their action -- for their
10 attorney's action.

11 THE COURT: Okay. Mr. Lucey or Mr. Bouch?

12 MR. LUCEY: Yes, Your Honor. The attorney/client
13 privilege applies in the strictest sense -- in the
14 first sense, to advice provided by an attorney to his
15 client. It does not cover all communication between an
16 attorney and a client, although we generally look at it
17 that way.

18 It will sometimes cover the client's -- it does
19 cover the client's communication of facts to the
20 attorney, but it does not cover the underlying facts
21 themselves. The client's knowledge of facts are still
22 discoverable.

23 In this case, Your Honor, there was no question
24 that either expressly or implicitly requested the
25 witness to provide testimony regarding advice the

1 attorney had given the Assembly or to her. It was
2 simply factual questions. That Assembly has to take a
3 position on some things, whether or not they have an
4 attorney; am I going to file suit; am I not. If I'm
5 going to file suit; why. The why I file suit, some of
6 that might be privileged. That might be, my attorney
7 told me to because... The why I did not file suit,
8 some of that might be privileged, but she answered it
9 in a factual way. We never authorized them because of
10 the veto power. She did not say, we never authorized
11 them because Mr. Bouch told me there was a veto power.
12 That would have been privileged. We do not think there
13 has been any waiver and we believe the court's correct
14 in its interpretation.

15 THE COURT: Okay. Mr. Bouch, Mr. McLeod, anything
16 further?

17 MR. BOUCH: Your Honor, I think Mr. Lucey said it,
18 I didn't say, what did I tell you, or what did you --
19 there was no reference to any discussion I ever had
20 with her.

21 THE COURT: Okay.

22 MR. BOUCH: And that was why I believe the
23 privilege was not waived.

24 THE COURT: I do not think that the privilege was
25 waived. That is my ruling, so you have the ruling. I

1 think that you need to protect the record.

2 Now, here's the question though, I -- a couple
3 of depositions have been taken of Ms. Bedell, I
4 believe?

5 MR. DUFFY: Correct.

6 THE COURT: And that, I guess, has never come out
7 before. It's the first time that I had heard it, that
8 the reason they did not sue was because of the veto
9 power. Is that something you need to inquire further
10 of her about? I mean, we can get her up there and you
11 can ask it in camera, and then we can go from there,
12 but...

13 MR. DUFFY: I think that will be --

14 THE COURT: I think you were surprised. I think
15 everybody was.

16 MR. LUCEY: Your Honor, obviously the plaintiffs
17 object.

18 THE COURT: Sure.

19 MR. LUCEY: And I would again mention to the
20 court, that the whole line of testimony was elicited by
21 their use of Exhibit 112, which they moved in limine to
22 keep out of the case --

23 THE COURT: But you didn't object when he stood
24 up. I kept waiting for the objection to be, they moved
25 in limine to keep this out, now they are picking and

1 choosing from it.

2 MR. LUCEY: But the whole line of testimony was
3 brought forth by them trying -- them intentionally
4 trying to set up this juxtaposition between
5 presettlement and post settlement; why are you doing
6 this; why are you doing that. You've changed
7 everything based on the settlement. They communicated
8 their theme. They opened the doors. They communicated
9 their theme, and that's where -- that's where they
10 ended up. And at this point, they -- they have what
11 they have got.

12 THE COURT: I agree with that. Well, they have
13 what they got, and what they got was help from the
14 23 -- the derivative claim, for you. So what I'm
15 offering is for them to be able to ask her some
16 questions in camera. You are not prejudiced by that.

17 MR. LUCEY: Not in camera.

18 THE COURT: It protects them.

19 MR. LUCEY: Yes, ma'am. I didn't know it was in
20 camera. But if I may say one more thing, Your Honor?

21 THE COURT: Sure.

22 MR. LUCEY: All --

23 THE COURT: Where is she by the way? Did somebody
24 let her know she needs to get on down here?

25 MR. MCLEOD: She had a doctor's appointment this

1 morning.

2 MR. BOUCH: We told her not to come until after
3 the jury charge conference --

4 THE COURT: Well, somebody needs to call her to
5 get her here ASAP.

6 MR. MCLEOD: Yes, ma'am.

7 MR. BOUCH: Your Honor?

8 MR. LUCEY: May I finish, please, Mr. Bouch?

9 MR. BOUCH: Yes. I'm sorry.

10 MR. LUCEY: Your Honor, the testimony regarding
11 the veto was cumulative. Mr. Tom Graham already
12 testified that his veto was in the nature of the
13 Supreme Court. And, Your Honor, they've already
14 impeached her on it. They went back to her deposition.
15 They said, you didn't say that in 2013, here is your
16 deposition. They rubbed her nose in it. They made
17 their point. She looked bad.

18 Your Honor, we respectfully believe that they
19 should not have a second opportunity to do that. It
20 would put undue emphasis on a point that they've
21 already made very well.

22 THE COURT: Well, except for the fact that I've
23 now said the word "in camera" at least three times, but
24 keep arguing if you want to. I've got all next week.
25 Yes, sir.

1 MR. DUFFY: Thank you, Your Honor. I just wanted
2 to make the point about opening the door for what it's
3 worth, we did not introduce those exhibits into
4 evidence. But if you recall when I asked, did you
5 advise the community of a particular thing that relates
6 to their claims for damages and settlement, she went on
7 for 10 minutes. So I had to put it in front of her and
8 say --

9 THE COURT: Right.

10 MR. DUFFY: Okay, now tell me is this right.

11 THE COURT: Right.

12 MR. DUFFY: I don't think I unnecessarily opened
13 the door to something I had objected to before.

14 THE COURT: You did not. Okay. Let's talk about
15 jury charges while we are waiting for her to get here.
16 Yes, sir. What else?

17 MR. DUFFY: Sorry, Your Honor, just two other
18 points if I could. One really quickly is, however Your
19 Honor wants to handle the issue we are addressing now,
20 we do have the last witness ready whenever it suits
21 you.

22 THE COURT: Okay.

23 MR. DUFFY: The other is -- another point on Ms.
24 Bedell's testimony, unfortunately, was -- I think gives
25 yet another reason that Your Honor needs to take

1 judicial notice of what we had requested at pretrial,
2 is that when asking about the representations to the
3 Court of whether it was perpetual, her response was
4 Your Honor's comment outside of the presence of the
5 jury. I think it needs to come from Your Honor that
6 that is what was represented to the court.

7 THE COURT: I'm not going to do that --

8 MR. BOUCH: Your Honor --

9 THE COURT: Listen, Mr. Bouch --

10 MR. BOUCH: No, ma'am. I'm sorry. I thought
11 better of it, Your Honor, I have nothing to say --

12 THE COURT: You have learned. I'm so proud.
13 We've come such a long way since the last trial. Look,
14 I've said all along, many of you have client control
15 problems. There are always people that think they are
16 smarter than everybody else, and that causes problems
17 in trials. Okay. But I'm not going to scuttle this
18 week long trial that we've been in for the second time
19 because of this again. Okay.

20 If I need to attempt to keep the defendants from
21 being prejudiced by letting them inquire more with her
22 in camera, that's what we are going to do. If you want
23 me to instruct the jury to disregard that comment, I'm
24 happy to do that. I think they got my point pretty
25 strongly yesterday when I corrected her in front of

1 them. But -- and you are free to argue however you
2 want to argue, you did cross examine her on that. But
3 if you want -- Mr. Duffy, if you want to inquire more
4 about that, I'm happy for you to do that when we have
5 her in camera. Okay.

6 MR. DUFFY: Thank you, Your Honor.

7 THE COURT: All right. But I don't think another
8 instruction is going to be helpful. If you really want
9 me to do that, I'll do it. But they got the point
10 pretty strongly I think.

11 Anything further at this point on that, or on
12 Ms. Bedell -- how far away is she? When can she be
13 here?

14 MR. BOUCH: Your Honor, she should be here in a
15 few minutes. She's on the way. I'll see if I can't
16 hustle it along.

17 THE COURT: No, she doesn't need to be hustled
18 along. But y'all -- here's the thing -- let's go off
19 the record, although I'll put this on the record if
20 anybody wants me to.

21 (Whereupon, a discussion off-record was held.)

22 THE COURT: Okay. Do we want to talk about jury
23 charges now, or do we want to put that witness up so he
24 can go, and then deal with our legal issues by giving
25 the jury an extended lunch break?

1 MR. DUFFY: Our preference, Your Honor, would be
2 to go ahead and put the witness up.

3 THE COURT: All right. Let's go ahead and put the
4 last witness up, then we can send the jury back. Let
5 me make sure they're all here --

6 THE BAILIFF: They are.

7 THE COURT: Oh, wonderful. Okay. Then let's
8 bring the jury in then. Yes, sir?

9 MR. MCLEOD: I said she was on her way now, we had
10 told her she didn't need to be here for the charge
11 conference. And so it was almost the --

12 THE COURT: Just please, please don't change from
13 who you were before you went to work there. Okay.
14 That's my point.

15 MR. MCLEOD: Yes, ma'am.

16 (WHEREUPON, the jury enters the courtroom at
17 approximately 9:53 a.m.)

18 THE COURT: Thank you, ladies and gentlemen, while
19 we work through our technology issue. I certainly
20 appreciate your patience. We are ready to continue
21 with the defendant's case, so I will ask that they call
22 their next witness.

23 MR. YOUNG: Thank you, Your Honor. The defense
24 calls Mike Robinson.

25 THE COURT: All right. Mr. Robinson, if you'll

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1 come on up, we'll swear you in.

2 MICHAEL C. ROBINSON, after
3 having been duly sworn, testified as follows:

4 THE CLERK: Thank you, sir. Please have a seat.
5 Please state your full name for the record, spelling
6 your last.

7 THE WITNESS: Michael C. Robinson.
8 R-o-b-i-n-s-o-n.

9 **DIRECT EXAMINATION BY MR. YOUNG:**

10 Q. Good morning, Mr. Robinson. Can you tell us,
11 please, a little bit about your background; that is,
12 what is your profession?

13 A. I'm in the business of real estate appraisal,
14 and I've been appraising for approximately 45 years.

15 Q. All right. And where were you born and
16 raised?

17 A. Charleston.

18 Q. And tell us a little bit about where you went
19 to school; when did you graduate?

20 A. I went to local schools. I graduated from the
21 Citadel in 1965.

22 Q. All right. And since 1965, can you give us a
23 bit of a summary of your job history, where you have
24 worked, and who you have worked for?

25 A. Well, I went in the Army for a couple years

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1 during the late '60s. I got out and went to work with
2 the Charleston County Tax Assessors Office in the late
3 '60s. From there I moved on and worked for a bank in
4 town as an appraiser for about ten years, and then I
5 opened my own company.

6 Q. And so when did you open your own company?

7 A. Approximately 1983.

8 Q. All right. And let me back up a little bit
9 and ask you, have you got any licenses from the State
10 of South Carolina?

11 A. Yes, sir. I have a certification -- unlimited
12 certification to appraise any type of real estate.

13 Q. Okay. And is that the highest type of
14 appraisal license that you can get in South Carolina?

15 A. It is the highest license. In addition to
16 that, I have a professional designation from a
17 recognized appraisal organization called The Appraisal
18 Institute. And they award a designation that's really
19 a step beyond a certification.

20 Q. And tell us what the name of that designation
21 is please?

22 A. It's a M.A.I designation.

23 Q. M.A.I. Appraiser?

24 A. Yes, sir.

25 Q. And when did you first get that designation?

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1 A. About the same time I opened my company, 1983.

2 Q. Yes, sir. And you mentioned The Appraisal
3 Institute, can you tell us, please, what that group is?

4 A. It's the oldest recognized appraisal
5 organization in the country founded in the '30s. And I
6 think it was founded, really, as an offshoot from the
7 problems that were experienced during the depression.

8 Q. Okay. And then over the years, have you ever
9 served on any public -- any public service roles here
10 in the Charleston County or Tricounty area?

11 A. Yes, sir. I've been on the City of Charleston
12 Board of Zoning Appeals since approximately 1990.

13 Q. Okay. And are you still on that today?

14 A. I am.

15 Q. All right. So that's 24 years or so?

16 A. I think it is. I don't do the math often.

17 Q. Okay. And, Mr. Robinson, can you tell us a
18 little bit about what types of appraisals you have done
19 over your 40 years or so career?

20 A. I think I have appraised every type of real
21 estate there is.

22 Q. Have you appraised residential property
23 before?

24 A. Yes, sir.

25 Q. And have you appraised commercial property

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1 before?

2 A. Yes, sir.

3 Q. And have you appraised civic property before?

4 A. Yes, sir.

5 Q. All right. And can you give us sort of a
6 sample or a summary of who some of your clients are
7 that the jury might recognize, local companies, or
8 banks or industries?

9 A. Well, we appraise for all the banks in town.
10 We do appraisal work for the City of Charleston, City
11 of North Charleston. The State Ports Authority;
12 Commissioner of Public Works, South Carolina Electric &
13 Gas; and private individuals and developers.

14 Q. Okay. And has that been your business since
15 at least 1983?

16 A. Yes, sir.

17 Q. All right. And, Mr. Robinson, do you keep
18 track of or have an idea that you can tell us about how
19 many appraisals your company or you might be involved
20 in, in a given year? Just ballpark?

21 A. The company, hundreds.

22 Q. Okay. Is it that -- been doing hundreds of
23 appraisals per year for the last 20 years or so?

24 A. Yes, sir.

25 Q. Would that be fair and accurate?

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1 A. Yes, sir.

2 MR. YOUNG: Your Honor, at this point, we'd offer
3 Mr. Robinson as an expert in the appraisal and
4 valuation of all forms of real property, including
5 residential, commercial and civic in the Lowcountry and
6 in South Carolina.

7 THE COURT: Okay. Any voir dire or objection?

8 MR. EVANS: No objection, Your Honor.

9 THE COURT: All right. Mr. Robinson is so
10 qualified.

11 MR. YOUNG: Thank you.

12 BY MR. YOUNG:

13 Q. Now, Mr. Robinson, tell us a little bit about
14 how you got involved here when you -- you brought your
15 file with you, correct?

16 A. Yes, sir.

17 Q. All right. And in this case, you actually
18 prepared a written report as well; is that true?

19 A. I did.

20 Q. All right. And did you bring those things
21 with you today, so that you could offer some testimony
22 in court?

23 A. Yes, sir.

24 Q. And is this a copy of your -- this is sort of
25 a little fancier copy, but is this a copy of your

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1 report?

2 A. It is.

3 Q. Okay. And you have that with you?

4 A. I do.

5 Q. Okay. Can you tell us, please, who called you
6 and what you -- how you were hired? Walk us through
7 that process if you would.

8 A. I received a call from Brian Duffy several
9 months ago, and he asked to come by and spend some time
10 and explain a case he was involved in and explained it
11 to me. He asked if I would consider becoming involved
12 in valuing the property.

13 Q. Okay. And at that time, did you discuss with
14 Mr. Duffy how you charge for your services and what
15 your rates are and so forth?

16 A. I did.

17 Q. And can you tell us what that is, please?

18 A. Well, I told him that I would charge a set fee
19 for the appraisal, and any additional consultation or
20 courtroom time would be based on an hourly rate.

21 Q. Okay. And what was the fee for the appraisal?

22 A. \$10,000.

23 Q. And is that your normal, customary fee?

24 A. Yes, sir.

25 Q. And what's the fee that you charge by the hour

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1 for your time involved?

2 A. The consultation and deposition, courtroom
3 time is at the rate of \$300 an hour.

4 Q. And is that also your normal hourly charge for
5 matters like this?

6 A. Yes, it is.

7 Q. And then -- tell us, please, Mr. Robinson,
8 what you did and what you were asked to analyze and
9 what you were asked to look at, please?

10 A. Well --

11 Q. And feel free if it's helpful to refer to
12 your notes, if you need to.

13 A. Well, basically, I was asked to render an
14 opinion of the value on the interest held in lot CV-5
15 and CV-6 in I'On subdivision, held by the I'On
16 Assembly.

17 Q. Okay. And were you provided with some
18 materials, or can you tell us what you looked at -- you
19 said you looked -- you wanted to determine the value of
20 CV-5, right, and CV-6?

21 A. The ownership interest of the I'On Assembly in
22 those two lots.

23 Q. Okay. The value of the Assembly's ownership
24 interest; is that right?

25 A. Yes, sir.

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1 Q. Okay. And so can you tell us, please, what
2 kinds of things you were provided with, and what things
3 you looked at in order to do your analysis?

4 A. We were given a number of documents, the chief
5 of which was the copy of a settlement agreement that
6 was made in February of 2014.

7 Q. Okay. If we could, I'm going to put that on
8 the Board behind you. It's Exhibit Plaintiff's 225.
9 And I want to make sure that this is the same document
10 you were provided with. And you could look at it on
11 the screen in front of you if you prefer, or I could
12 give you a hard copy. But does that look like --

13 A. Yes, sir. That's the document.

14 Q. -- the settlement agreement?

15 A. It is.

16 Q. All right. So you were provided with a copy
17 of that, and why was that important to your analysis,
18 please?

19 A. Because that outlined the interests in those
20 two lots that the Assembly has from that day forward.

21 Q. Okay. And what else were you provided with or
22 what else was necessary for you to do your analysis,
23 Mr. Robinson?

24 A. Well, there were backup documents such as the
25 deeds and plats, and so forth, that I looked over. But

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1 this document is -- was really the main ingredient.

2 Q. Okay. Now, what is the importance of the
3 deeds and plats that you looked at? For example, why
4 is that important to your analysis?

5 A. Well, they support the information that's
6 presented in this settlement agreement.

7 Q. All right. And when you're doing your
8 analysis, can you tell us, please, what kinds of things
9 you need to figure out to come to an opinion about the
10 value of the Assembly's ownership interests in these
11 two items?

12 A. Well, it -- it's an identification of the
13 rights they have in those two properties.

14 Q. Okay. And we heard some testimony earlier in
15 the case about fee simple rights; does that bear into
16 your analysis at all?

17 A. Partially, but not exclusively.

18 Q. Can you just explain to the jury a little bit
19 about what fee simple rights are, please?

20 A. Fee simple rights are absolute rights that you
21 have to a piece of property that -- free and clear of
22 any encumbrances whatsoever, any side agreements or any
23 leases, or any arrangements you have with other people
24 outside yourself.

25 Q. And the materials that you used to render your

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1 opinions and come to your conclusions in this case,
2 were they sufficient for you to make a reasonable
3 determination of the value of the Assembly's ownership
4 interests in these items?

5 A. Yes, sir.

6 Q. And are these the types of things that you
7 customarily rely on in doing this kind of work?

8 A. Yes, sir.

9 Q. All right. And did you ultimately come to a
10 conclusion -- and we're going to sort of unpack it --
11 but first I want to ask you, did you come to a final
12 conclusion about the value of the items that the
13 Assembly received in CV-5 and CV-6?

14 A. Yes, sir. I did render an opinion of that
15 value.

16 Q. And you came to that opinion on a particular
17 date; is that correct?

18 A. Yes, sir.

19 Q. And what is the effective date of your
20 opinion, and tell us how the date is important?

21 A. The effective date of the valuation was the
22 same as the date in the agreement, and that was
23 February 1, 2014.

24 Q. Okay. And what was the opinion that you came
25 up with based on -- and like I said, we're going to

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1 unpack it a little bit -- but the total bottom line
2 value that you came up with for the Assembly for CV-5
3 and 6; and then we'll talk about how you got there.

4 A. My opinion of the value of the interest held
5 by the Assembly, I'On Assembly, as of that date, was
6 \$1,765,700.

7 Q. All right. One million, seven hundred --

8 A. Sixty-five.

9 Q. Yes, sir.

10 A. Seven hundred.

11 Q. Seven?

12 A. Seven hundred.

13 Q. Okay. That's the value of what the Assembly
14 received through the settlement agreement; is that
15 correct, in real estate terms, the appraisal?

16 A. Yes, sir.

17 Q. Now, Mr. Robinson, I want to ask you to -- I
18 want to hand you a couple of things. In doing your
19 analysis, were you provided with -- or do you have in
20 your file, a plat that shows the particulars of CV-6,
21 civic lot number six?

22 A. I do.

23 Q. All right. And what's the importance of that
24 plat? Tell us -- tell us what you looked at -- well, I
25 think -- I want to make sure we're talking about the

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1 same thing. Does that look like the plat?

2 A. Well, that's not actually a plat, sir. I
3 wouldn't classify that -- a plat has more of a legal
4 connotation. This is a diagram.

5 Q. All right. And what is that diagram -- what
6 kind of information does that diagram of CV-6 provide
7 for you?

8 A. This diagram was given to me and it identified
9 the land area that the I'On Assembly has use of at this
10 point in time.

11 Q. Okay. And so tell us what you mean "the I'On
12 Assembly has use of" -- as compared to which part it
13 does not have use of?

14 A. Well, they have fee simple use of this -- of a
15 certain amount of land according to the agreement on
16 this one particular lot, CV-6, and part of the lot they
17 don't have use of at this time.

18 Q. Now, which part did they not have use of?

19 A. That's the part that's under lease.

20 Q. Okay. But they have the use of the entire
21 remainder of the lot, correct?

22 A. Correct.

23 Q. All right. And you analyzed it that way,
24 correct?

25 A. Yes, sir.

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1 Q. All right. And then I want to put up -- I
2 think it's -- and then you -- after you provided this
3 report -- let's put up Plaintiff's Exhibit No. 200. I
4 think this has been admitted, 200. This is Plaintiff's
5 Exhibit No. 200. And I'll show you a copy to look at
6 here, and ask you what -- if you can tell us what that
7 is, please?

8 A. This is a plat, a stamped plat. And it is of
9 lot CV-6, and it more formally identifies the areas
10 divided between the portions that may be utilized by
11 the Assembly and the portions that are under lease.

12 Q. Now, Mr. Robinson, if I give you this pointer,
13 and we blow that up a little bit, can you show the jury
14 what you are taking about, which part is subject to a
15 lease and which part is -- there we go, Lee Ann. Let's
16 blow that up right there.

17 A. This portion here that runs that line in that
18 fashion, all the way out and down to here, back around
19 along the edge of the creek and the marsh, and back
20 down here; all of this can be utilized by the Assembly.
21 This portion, within this line, this way going this
22 way, may not. This is the portion that's under lease
23 here.

24 Q. And where it says "civic lot CV-6", and
25 there's a solid line around it, including the building,

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1 that's the portion that's under lease; do I understand
2 that correctly?

3 A. This is CV-6, this designation. This is the
4 designation for the entire lot. But the portion that's
5 under lease is basically from this line over to this
6 line, including up in here.

7 Q. Okay. So the rest of the -- the rest of CV-6
8 is not under any encumbrance or any lease or anything
9 like that?

10 A. That's correct.

11 Q. All right. And the plat, Plaintiff's Exhibit
12 No. 200, tell us -- it's a little bit different from
13 the diagram you first had, isn't it?

14 A. It is.

15 Q. All right. And are there any important
16 differences about it that will affect the valuation
17 that you gave?

18 A. Well, the diagram I was given early on, during
19 my preparation of the report, shows a smaller land area
20 that the Assembly might use compared to this plat. The
21 plat shows approximately 7,000 more square feet that --
22 that actually can be used by the Assembly.

23 Q. Okay. So until you had the plat, you had
24 information that there was 7,000 square feet less for
25 the Assembly to use; is that correct?

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1 A. Yes, sir. That's correct.

2 Q. And we'll get to this in a minute. So,
3 ultimately, the Plaintiff's 200 had an effect on the
4 valuation that you came up with, based on the
5 information you had at the time; is that correct?

6 A. Plaintiff's 200, that's the plat?

7 Q. Yes, sir.

8 A. Yeah. I -- I didn't have that document at the
9 time I prepared the report.

10 Q. Okay. But so today, you are -- this number is
11 going to change, isn't it?

12 A. Yes, sir, it will.

13 Q. And one of the reasons it's going to change is
14 what?

15 A. Because the Assembly has use of more of lot
16 CV-6 than was initially represented to me.

17 Q. Okay. You got some better information and
18 some more accurate information; is that true?

19 A. Correct.

20 Q. All right. All right. So, Mr. Robinson, let
21 me try to unpack this: Do you have a section in your
22 report that would help you explain to us and speed this
23 along, about how you came up with your analysis and
24 what the numbers are?

25 A. Yes, sir, I do.

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1 Q. All right. And I want to walk through those
2 one at a time. Okay?

3 MR. YOUNG: Or better yet, if I could, Your Honor,
4 I might ask him to walk through -- step down and mark
5 on this chart, if that's --

6 THE COURT: You may. Thank you, sir.

7 BY MR. YOUNG:

8 Q. Well, Mr. Robinson, let's take them one at a
9 time and I'm going to see if I can -- what is the
10 first -- let's -- what are the items that you valued to
11 reach your total opinion?

12 A. Well, after reading the settlement agreement,
13 it was my opinion that the six components of value that
14 the I'On Assembly had by virtue of the agreement, and
15 those are the components that I rendered an opinion on.

16 Q. All right. Now, if I give you this pen,
17 without writing a big long thing, could you write one
18 through six --

19 A. Do you want me to write it?

20 Q. If you could.

21 A. Okay. The first item is -- just what we
22 talked about -- what is the value of the portion of
23 land that can be utilized by CV-6, what is that worth.
24 In order to estimate that value, I did -- I did a sales
25 comparison approach of lots, deep water lots, and came

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1 up with a value of lot CV-6. And then I assigned a pro
2 rata amount to the 20,000 square feet that the I'On
3 Assembly has the right to use in fee simple. They have
4 the right to use that, and that is the first component.

5 Q. So what would you call that? What's a short
6 way to refer to that, component number one?

7 A. I would say Assembly's -- Assembly's portion
8 of CV-6.

9 Q. Okay.

10 A. That's not exactly right, but I have a title
11 for the whole thing but...

12 Q. All right. And tell us how you came up with
13 the methodology? I think you just walked through that;
14 is that correct?

15 A. I did. I did a sales comparison approach as
16 you do in a standard real estate appraisal. I
17 estimated a value. The fee simple value of the lot,
18 they don't own the lot in fee simple, not the entire
19 lot. The only portion they're allowed to use in fee
20 simple fashion is the portion on the right that we've
21 been talking about, that 20,000 square feet --

22 Q. And I'm sorry to stop you, but just for their
23 benefit, explain a little bit about sales comparison;
24 what sort of approach is that? What does that mean?

25 A. Well, when you estimate the value of a lot or

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1 anything else, building, or office or whatever you do,
2 and you do research and look for sales of property --
3 similar properties that recently sold, that are in a
4 comparable nature.

5 Q. Okay. And in this case, where did you go --
6 what similar properties, just generally, did you look
7 at? Not going one by one.

8 A. Well, we looked at a couple, Molasses Creek,
9 several sales on Molasses Creek. And very near, Hobcaw
10 Creek -- then we looked -- we expanded the search, and
11 the next place we found, somewhere on Daniel Island.

12 Q. Okay. Now, back -- back to this, what did you
13 come up with the value for that portion of CV-6, that
14 the Assembly is allowed to use?

15 A. Well, I penciled in the change due to the
16 increase in size. Which value is it that you want me
17 to write --

18 Q. Well, that's a good point. Let's go with the
19 value based on the best information available, and the
20 best information available is Plaintiff's 200, correct?

21 A. Yes, sir.

22 Q. Okay. So let's write that number, what you
23 came up with there?

24 A. The value of that, based upon the professional
25 plat, is \$661,928.

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1 Q. Okay. And then what was the next -- now, I'll
2 just tell you from experience -- maybe you can write a
3 little bigger -- we might have to have two pages.
4 Let's write that number so we can read it, right across
5 there. \$661,928. All right. Then what was the next
6 component of value that you looked at?

7 A. The next component of value was the current
8 value of the docks, boat ramp, the bulk head and so
9 forth on the creek, that the Assembly has use of and we
10 estimated value for that.

11 Q. Okay. And what value did you come up with for
12 that?

13 A. Five hundred and -- well, once again, that was
14 an item that we had information on, initially, in the
15 preparation of the report. After the report was
16 published, we got a new document showing a small
17 increase, nothing of any major consequence, but it was
18 a new number.

19 Q. Okay. Again, based on the best information
20 available to you, including specifically Plaintiff's
21 Exhibit 200, what was that number?

22 A. That docks, boat ramp, bulk head --

23 Q. Docks, boat ramp, bulk head --

24 A. And paving.

25 Q. And paving.

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1 A. Not paving, but gravel -- preparation of the
2 parking lot.

3 Q. Yes, sir.

4 A. Parking lot prep, that number was \$501,400.

5 Q. \$501,400?

6 A. Yes, sir.

7 Q. And we've got a dual difficult problem,
8 because the court reporter has got to take everything
9 down as you speak.

10 A. I apologize.

11 Q. Okay. All right. And then what was the next
12 component of value to the Assembly that you looked
13 at -- well, I guess, it looks like you move over to
14 CV-5; is that correct?

15 A. Yes.

16 Q. All right. So is this the end of the value
17 that you analyzed on CV-6?

18 A. Well, not really because there were some fees
19 and income.

20 Q. Very good. Let's talk about everything that
21 has to do with CV-6, and then we'll move to CV-5.

22 A. Okay.

23 Q. This is real properties values you looked at,
24 correct, on CV-6?

25 A. Yes. This has to do with physical real

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1 estate.

2 Q. All right. And did you put any value at all
3 on the building?

4 A. I didn't estimate any value to the building
5 because currently it's leased, and it's leased for
6 another 20 years. And I didn't put any value on it
7 because it's already some 12, 14 years old. And
8 considering the fact that it's not really known what
9 kind of condition it's going to be in at the
10 termination of the lease, I decided not to give it any
11 value at this point in time.

12 Q. Okay. And in other words, would that be more
13 conservative or more aggressive in your valuation of
14 this property?

15 A. Well, there are good chances it will have
16 value at that time, but I just -- um -- did not put any
17 value on it.

18 Q. Okay. All right. And then moving on to the
19 other items that you did value, tell us why you put a
20 value on them and how you came up with the number as it
21 pertains to CV-6?

22 A. Six. Well, so I don't get confused, that's
23 five. I'll come back to that. But item D in my report
24 is -- the present value estimate of a portion of lot
25 CV-6 leased to 148 Civitas. Now, the lease including

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1 options extends to February 1, 2044. The Assembly will
2 not have any use of that lot until 2044, which is 30
3 years from now so --

4 Q. Mr. Robinson, on the diagram, are you talking
5 about the part inside the lines there?

6 A. It's the part of the left side of lot CV-6,
7 yes, sir.

8 Q. Okay. That you pointed to earlier?

9 A. Correct. So that's the portion under lease.
10 And the Assembly won't be allowed to use that for 30
11 years. But after 30 years, they will have it and the
12 -- their use of the entire property will be combined
13 and they will have use of the entire CV-6 in 2044. So,
14 the portion under lease has no value right now, but it
15 will in 2044.

16 We took the value of the lot right now, and we
17 trended it upward for the passing of time to 2044,
18 giving an estimate of what the value would be at that
19 point in time. And we did it on a conservative basis,
20 saying if it was worth \$1 today, it would be worth \$3
21 in 2044.

22 Then recognizing that's a 2044 number, we had to
23 discount it back to what its present value might
24 actually be, and that is the value that is -- is -- one
25 of the components or interests of the Assembly in this

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1 lot.

2 Q. Okay. And -- and that's -- is that called the
3 discount rate?

4 A. It's a discounting process, yes, sir.

5 Q. All right. And there's already been some
6 testimony about the discount rate. Tell us please what
7 discount rate you used in your analysis and why?

8 A. I used a discount rate of ten percent. You
9 know, 30 years out is a good period of time. There are
10 lots of things that can happen between now and then.
11 We've certainly seen that in the last four or five
12 years, what can happen in the market. And for somebody
13 to be interested in owning something like this and not
14 having use of it to 2044, they want to discount it by a
15 fair amount. It's really similar to what a yield rate
16 might be, the discount rate is, and that's what my
17 opinion is that it would be the proper rate to discount
18 it back for that period of time.

19 Q. Okay. And if you would use the lower discount
20 rate, like six percent, would it have made your number
21 higher or lower?

22 A. It would have increased my value estimate
23 substantially.

24 Q. So by using 10 percent, did you use a more
25 conservative analysis than six percent?

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1 A. It -- it -- it presents as a lower number.

2 Q. Yes, sir. Okay. Tell us, please, what you
3 came up with for this next component?

4 A. That component, the value of the leased
5 portion of CV-6, giving no value to the building, the
6 lot only is -- now there's another ingredient in
7 there --

8 Q. Please.

9 A. -- that I want to explain, because I don't
10 know if the jury has a copy of the report. They will
11 see if they do. But if you remember, the size of the
12 portion of the lot that can be used by the Assembly
13 increased because of the new plat that I received, so
14 the size of the portion that can be utilized by the
15 lease was reduced.

16 Q. Yes, sir.

17 A. So that meant this particular number goes down
18 in my report.

19 Q. Now, I'll -- I'll make it clear, the jury will
20 not have a copy of your report. Your testimony today
21 is what's important, and we want to make sure we're
22 using the most current and most accurate information.

23 A. All right. And that accurate information
24 shows the value of what they receive in 2044, at
25 today's numbers, is \$39,632.

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1 Q. Okay. So after you apply the discount rate to
2 the section that's being leased, and reduce it back to
3 present value, you come up with close to \$40,000,
4 correct?

5 A. That's present value of the leased part of
6 CV-6.

7 Q. Land only, right?

8 A. Land only.

9 Q. Okay. And then what was the next component of
10 value you looked at for CV-6?

11 A. The next component is the present value of the
12 income that will be obtained from the Creek Club lease
13 to Civitas in the option years 20 through 30. The
14 lease carries no monetary value for 20 years. It's
15 basically -- so I assigned no value to that. But
16 starting in the year '20, rent will be -- begin to be
17 paid on a monthly basis.

18 Q. And what does that information come from, Mr.
19 Robinson?

20 A. That's in the settlement agreement.

21 Q. This Plaintiff's 225, specifies what the rent
22 will be for the last two -- the option terms?

23 A. Yes, it does. It specifies the rent for the
24 first five year option period to be \$6,000 a month;
25 that's years '20 through '25. And years '25 through

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1 '30, it specifies the rent will be \$8,000 a month.

2 Q. Okay.

3 A. So recognizing --

4 Q. Excuse me. I'm sorry. Go ahead.

5 A. Recognizing that the Assembly receives zero
6 for 20 years, but they will start receiving \$6,000 a
7 month in the years '20 through '25, I calculated what
8 that was annually and then discounted it back and
9 discounted it back for the 20 years that they don't --
10 do not receive it, and I came up with a number on that.

11 Q. Did you use the same 10 percent rate that you
12 used before?

13 A. The same 10 percent discount rate.

14 Q. Okay. And what number did you come up with
15 for the present value of that future income?

16 A. The present value of the future income from
17 both option periods is \$69,765, to present value of
18 lease income for the years '20 through '30, \$69,765.

19 Q. Okay. Was there any other value component
20 that you looked at pertaining to CV-6 or is that all of
21 them?

22 A. No, there's one more.

23 Q. Okay. If you crouch -- but do you think you
24 can fit it on there.

25 A. The next one is the net present value of

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1 income to be received for the closing of the pavilion
2 and the Marshwalk, starting from January 2015 to
3 December of 2033.

4 Q. And where did you get that information to come
5 up with those numbers?

6 A. That's in the settlement agreement as well.

7 Q. Okay.

8 A. The beginning of 2015, the Marshwalk and the
9 pavilion can be closed for 30 minutes, no more than
10 three times a week for a fee of \$350 per event.
11 Beginning in 2024 --

12 Q. This section here, coming out of the
13 settlement agreement?

14 A. Yes, sir.

15 Q. Okay. Sorry for my interruption.

16 A. You know, and that's where I got this
17 information. And beginning in 2024, the closure fee
18 will increase to \$600 per event. The same number of
19 events, but the fee increases at that point in time.

20 Q. Okay. So that's another future income stream?

21 A. That's another future income stream. Once
22 again, I did -- I discounted it back. I did the
23 totals -- ran the totals out at \$350 an event, times
24 three events, times four weeks per month. Came up with
25 the monthly income to be received from closings, both

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1 at the \$350 rate and the \$600 rate. Discounted those
2 back at the same 10 percent factor, all the way out to
3 the end of when that income stream ceases to flow, and
4 came up with a value estimate of the closure fees.

5 Q. Yes, sir. And what number will we call that?

6 A. Closure fees.

7 Q. Closure fees, present value.

8 A. That number for closure fees is \$545,660.

9 Q. That's the present value of it, correct?

10 A. That's the net present value of closure fees.

11 Q. Just out of curiosity in your calculations, do
12 you have what the actual dollar value is before you
13 discounted it? I don't mean to make you do the math.

14 A. I don't.

15 Q. Okay. You've run those calculations and this
16 is the present value, right?

17 A. Yes, sir.

18 Q. All right. As it pertains to CV-6, is that
19 everything?

20 A. That's all the value components owned by the
21 Assembly and CV-6.

22 Q. Okay. And now, if you would, why don't you
23 circle all of those numbers for us just because I know
24 we're going to have to add them up.

25 A. (Witness complied.)

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1 Q. Okay. Now, do you have a total of what --
2 when you add all of those numbers, based on the best
3 and current, accurate information, what the value to
4 the Assembly is to their -- the appraised value for
5 CV-6?

6 A. I didn't total those. I put in CV-5 in that
7 total.

8 Q. Okay. If you had a calculator, we would add
9 it up, right?

10 A. We could.

11 Q. Let's switch colors, and go to red, and let's
12 do CV-5 now. And would it be better to go on the same
13 sheet or a new sheet?

14 A. I can squeeze it right in.

15 Q. Yes, sir. Tell us, please, what you looked at
16 on CV-5, and how you came to an opinion about the value
17 the Assembly received for CV-5?

18 A. CV-5 was a vacant lot, a little bit further
19 inland from CV-6, and it's utilized for parking right
20 now. And according to the agreement, as we referred
21 to, it's not owned by the Assembly. However, in 20
22 years, the title will transfer to the Assembly at no
23 cost. They'll receive a deed and not have to pay for
24 it, and they will own it in fee simple, and utilize it
25 in any fashion they wish.

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1 I started out with a fee simple value estimate,
2 just like I did on lot CV-6. I went out and searched
3 for comparable sales, and estimated the value of lot
4 CV-5 at today's prices. Then I trended that value
5 estimate forward for 20 years, in order to recognize
6 what a reasonable increase might be after a 20 year
7 period. Then I discounted that back all the way to a
8 present value estimate.

9 Q. The same -- the same manner of analysis that
10 you did with the CV-6?

11 A. Yes, sir.

12 Q. Okay. And what did you come up with for the
13 present value of the Assembly's rights in CV-5?

14 A. In CV-5, it was my opinion that the value --
15 present value of lot CV-5 is \$188,055.

16 Q. Now, is the -- let me ask you a question about
17 the -- did you take into account the fact that CV-5 has
18 got a civic -- is zoned as a civic lot, or what
19 difference did that make to your analysis?

20 A. It made no difference really.

21 Q. And why not?

22 A. Because it's -- in valuation of civic lots,
23 they carry the same value as the -- what the land is
24 worth that's immediately surrounding.

25 Q. And is that normally how your -- in your

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1 business, how things are appraised?

2 A. Yes, sir. Those are -- if you just figure --
3 going into the civic use, if a piece of property was
4 bought for a playground, and consequently after that,
5 it would be zoned conservation or some similar zoning,
6 the price would have to be paid for, it would be
7 commensurate with what the value was as residential
8 land, so it carries at the same value even after it
9 goes into a civic or conservation zone.

10 Q. So, is it fair to say, you considered those
11 issues in your analysis?

12 A. Yes, sir.

13 Q. All right. And have you appraised some other
14 civic properties around Charleston that the jury might
15 be familiar with, and use that same type of analysis?

16 A. Well, we've appraised numbers of those. We've
17 appraised Stoney Field, the football field owned by
18 Riley Park. We've appraised Corrine Jones Playground,
19 that's up on Hester Street. We've appraised -- we're
20 in the middle of appraising Hampton Park, which is up
21 by the Citadel. And all of those were appraised in the
22 same fashion.

23 Q. Okay. And let me ask you now -- we have to
24 squeeze it on maybe at the top -- did you add up all of
25 these numbers and come up with, based on the most

M. ROBINSON -- DIRECT BY MR. YOUNG

1 accurate information we have, the total value that the
2 Assembly received with CV-6 and CV-5, based on things
3 we've just been talking about?

4 A. Yes, sir. Based on that information, it's my
5 opinion that the value of the interests held by the
6 Assembly in lot CV-5 and 6 --

7 Q. Well, write that in black, I guess, across the
8 top if you can.

9 A. -- is \$2,006,400.

10 Q. All right. And, Mr. Robinson, before I let
11 you sit down, that's a little bit different than
12 your -- the number you gave us just a minute ago, which
13 was -- your report number was what?

14 A. The report number was a \$1,765,700.

15 Q. Okay. And why did it change, again, between
16 the time you did your report and today?

17 A. Well, there were three items that moved. The
18 major item that caused it to change was the
19 introduction --

20 Q. You can have a seat. I'm sorry. Thank you.

21 A. The new plat that came out, that changed
22 the -- my value estimate of what -- of the Assembly has
23 use of at the present time. The other thing was the
24 new information on the -- on the docks and ramp and
25 bulk head.

M. ROBINSON -- CROSS BY MR. EVANS

1 Q. Okay. And is that why your opinion went up a
2 couple hundred thousand dollars?

3 A. Yes, sir.

4 Q. All right.

5 MR. YOUNG: Your Honor, we would request to mark
6 this as our next exhibit in line, and have it made part
7 of the record. I think it's probably about 300.

8 MR. EVANS: Objection, Your Honor. It's
9 cumulative; cumulative to his testimony already.

10 THE COURT: I'm going to overrule the objection.
11 Let's get the right number. It will be so admitted as
12 the next exhibit in line.

13 (Defendant's Exhibit No. 183 admitted into
14 evidence.)

15 MR. YOUNG: Thank you. Thank you, Mr. Robinson.

16 THE COURT: All right. Cross-examination.

17 **CROSS EXAMINATION BY MR. EVANS:**

18 Q. Good morning, Mr. Robinson.

19 A. Good morning.

20 Q. Good to see you again. (Pause.) Mr.
21 Robinson, I want to make sure that the jury understands
22 your role here as opposed to some of the other folks
23 that they have heard from this week. They have heard
24 from folks that live in I'On and have been there for
25 years; you've been involved for several months now,

M. ROBINSON -- CROSS BY MR. EVANS

1 correct?

2 A. Correct.

3 Q. You don't have any understanding, belief,
4 opinion, regarding what promises were made and the
5 specific allegations in the case, correct?

6 A. That's correct.

7 Q. That's a difference between maybe a fact
8 witness and your role as an expert, correct?

9 A. Yes, sir. I have no knowledge of the dispute
10 going on.

11 Q. And you are here because someone, the
12 defendants, hired you to be here, correct?

13 A. Correct.

14 Q. They paid you to perform a service and deliver
15 an opinion, correct?

16 A. Yes, sir.

17 Q. And you understand that there was another
18 appraiser involved in this case from your review of the
19 file, correct?

20 A. I know there were other appraisals done. I
21 did not see an appraisal that was modeled after exactly
22 what my task was.

23 Q. Sure. But you know that Michael White was
24 involved in this matter generally, correct?

25 A. Yes, sir.

M. ROBINSON -- CROSS BY MR. EVANS

1 Q. And you know that Mr. White was not hired by
2 either party, correct?

3 A. I really don't know the circumstances of his
4 his employment.

5 Q. You've seen his appraisals, correct?

6 A. Yes.

7 Q. And you've seen that his appraisals are
8 addressed to a bank, not one of the parties in this
9 case, correct?

10 A. I -- I did notice that. I didn't look at each
11 and every one of them to be satisfied of that.

12 Q. And you are familiar with Mr. White, correct?

13 A. Yes, sir.

14 Q. And you believe he's a qualified and competent
15 appraiser, correct?

16 A. Yes, sir.

17 Q. What you've performed is an appraisal of what
18 you believe the Assembly owns as of February 2014,
19 correct?

20 A. Of their interests, yes.

21 Q. Not --

22 A. Ownership interests.

23 Q. I'm sorry. I didn't mean to cut you off.

24 A. Their ownership interests.

25 Q. You have not performed any appraisal as to

M. ROBINSON -- CROSS BY MR. EVANS

1 what the Assembly had to give up in order to get those
2 interests, correct?

3 A. Correct.

4 Q. Let's talk for just a moment, in a real estate
5 transaction -- and frankly, any sort of transaction,
6 whether somebody's buying a piece of real property, a
7 car, a set of golf clubs or a dress, there's usually
8 two sides to the -- to the transaction, correct?
9 There's somebody giving something on one side -- and
10 that's more often than not money; and the other half of
11 the transaction is what they're getting in exchange,
12 correct?

13 A. Yes, sir.

14 Q. And the people that are giving something,
15 that's often called consideration, correct?

16 A. Yes, sir.

17 Q. And in this transaction, you understand that
18 the consideration that the Assembly had to give for the
19 pieces of properties that you have been discussing with
20 Mr. Young, included cash and a 20 year lease for a
21 dollar a year, correct?

22 A. Yes, sir.

23 Q. And you considered that that lease, that 20
24 year essentially free lease, to be consideration,
25 correct?

M. ROBINSON -- CROSS BY MR. EVANS

1 A. For a dollar, yes, sir.

2 Q. Let's talk a little bit about the appraisal
3 that you performed. And if it's all right with you,
4 I'd like to work maybe in reverse order, if that's
5 okay. With regard to CV-6, you appraised the closure
6 fees, correct?

7 A. Yes, sir.

8 Q. And that's the closure of the tenant's right
9 to use, and close the docks and the walkway that gets
10 to the docks, correct?

11 A. Correct.

12 Q. You calculated that at three events per week,
13 four weeks per month, 12 months per year, correct?

14 A. Yes, sir.

15 Q. And that's 144 events per year, correct?

16 A. I'll trust your math.

17 Q. Well, three times four times 12 would be
18 144 -- 12 times 12, correct?

19 A. That's it.

20 Q. So, 144 events per year. You're familiar with
21 what was marked Plaintiff's Exhibit -- up on the
22 screen -- as Plaintiff's Exhibit 225, which was the
23 transaction, the agreement between 148 Civitas?

24 A. Yes, sir.

25 Q. And the Assembly?

M. ROBINSON -- CROSS BY MR. EVANS

1 A. Yes, sir.

2 Q. And you are aware that that agreement limits
3 the number of events to 120 events per year, correct?

4 A. It relates -- it says limited to 120 event
5 weddings, and wedding related activities.

6 Q. Did you understand that means closures of the
7 docks?

8 A. Well, to me, it meant weddings and wedding
9 related activities.

10 Q. Well, if those closures are limited to 120 per
11 year, meaning you can only close the dock 120 times per
12 year, you'd agree with me that your estimate that
13 resulted in a \$546,000 net present value of closure
14 fees, is overshoot by about 20 percent, correct?

15 A. No. Because I believe you could have 24 more
16 closures unrelated to weddings and wedding related
17 activities.

18 Q. Okay. And that's based on what?

19 A. One hundred forty-four a year.

20 Q. Have you looked at the lease that accompanies
21 the settlement agreement?

22 A. I really did not do an in depth look at the
23 lease.

24 Q. You are aware, from looking at this exhibit
25 225, that the Assembly has the option to buy out the

M. ROBINSON -- CROSS BY MR. EVANS

1 last ten years, years '21 to '30 of the lease, correct?

2 A. Yes, sir.

3 Q. If they do buy out those last ten years, the
4 net present value of the closure fees would go down to
5 some extent because they wouldn't be closing the
6 facility in years '21 through '30, correct?

7 A. Correct.

8 Q. Likewise, the rent figure that you totaled to
9 be about \$70,000 would go away as well, correct?

10 A. That's correct.

11 Q. So a portion of your closure fees are
12 speculative and the rent is speculative as well,
13 correct?

14 A. Well, if I might say that I don't feel it's
15 speculative because it would be a very imprudent thing
16 for them to exercise the purchase of those option
17 rights, because that number is so high that it would be
18 poor business to do that. And I can't imagine any
19 group or individual would exercise those bad options
20 based on that.

21 Q. Without knowing the basis for the claims in
22 this case, you don't know what's prudent, what's not
23 prudent, what's a proper business decision, or what's
24 an improper business decision, correct?

25 A. Well, that's correct. I'm just going on the

M. ROBINSON -- CROSS BY MR. EVANS

1 numbers and the facts I have, yes, sir.

2 Q. In calculating the dock -- I'll generally call
3 the dock value. I know there is some other things
4 related to it -- I think you said bulk head and ramp
5 and maybe -- maybe you even assigned a value for the
6 gravel that's spread out on the ground, correct?

7 A. Correct.

8 Q. In order to come up with that value, you used
9 what -- what you believe it cost to build those
10 facilities, correct?

11 A. I was given the original cost, the original
12 contractor's costs, yes, sir.

13 Q. Actually what you were given was a total of
14 the costs that was compiled by the Defendants, as
15 opposed to actually the invoices and bills and what
16 not, correct?

17 A. That is correct.

18 Q. So, for example, your figure that you used
19 could have had costs associated with something else,
20 correct? Since you didn't look at the backup material?

21 A. I did not audit the information.

22 Q. So, for example, you are not aware that
23 \$50,000 of that was for docks two and three, up the
24 tributary, correct?

25 A. I do not have a break down of it, no, sir.

M. ROBINSON -- CROSS BY MR. EVANS

1 Q. And, likewise, you're not aware that \$100,000
2 of that cost was for demo-ing the old dock and ramp
3 that are in a location where the pavilion and community
4 dock is today?

5 A. I don't have that information, no, sir.

6 Q. And given that those numbers that you were
7 provided by the defendants were over estimated -- or
8 excuse me -- included additional costs of \$150,000,
9 that would mean that the value that you used to
10 calculate the value of the docks today is inaccurate,
11 correct?

12 A. If there were any changes in costs, my value
13 estimate would have to be revisited.

14 Q. The improvements, the docks, you -- well,
15 first of all, proper appraisal principles require you
16 to go visit the site, correct?

17 A. Yes, sir.

18 Q. You didn't actually step foot on the docks,
19 correct?

20 A. Correct.

21 Q. You viewed the docks -- and the jury has seen
22 a number of diagrams of the property, and they know
23 that there's a road out in front of the property. And
24 the docks are on the backside where the water is,
25 correct?

M. ROBINSON -- CROSS BY MR. EVANS

1 A. Yes, sir.

2 Q. You viewed it from the road?

3 A. Correct.

4 Q. You didn't walk across the property? You
5 didn't walk down to the docks? You didn't go over to
6 the little -- where there's a bit of a bluff and down
7 onto the docks, correct?

8 A. That's correct.

9 Q. So you don't know what their physical
10 condition is, correct?

11 A. I can't testify to that.

12 Q. Okay. And physical condition is one of the
13 variables that gets plugged into performing an
14 appraisal of real property, correct?

15 A. Yes, sir.

16 Q. And you don't know what the physical condition
17 is?

18 A. I don't have that, no, sir.

19 Q. The building, you didn't assign value to the
20 building because the Assembly, the homeowners have no
21 rights to that building for another 30 years, correct?

22 A. Right.

23 Q. So the value of the building should not be
24 considered in any appraisal, correct?

25 A. Well, under many circumstances, as it is --

M. ROBINSON -- CROSS BY MR. EVANS

1 because if you do -- have use of the building, when
2 title reverts to you, it has some discounted value.

3 Q. You don't know what that's going to be because
4 you don't know what condition the building is in today
5 because haven't been in it? You don't know what
6 condition the building is going to be in, in 30 years,
7 correct?

8 A. Well, we -- we didn't do it because it's 30
9 years out, and we were -- we just decided not to assign
10 it any value.

11 Q. Okay. Let's talk about the land at CV-6
12 itself. I don't think you touched on it with
13 Mr. Young, but you valued the dirt, meaning -- ignoring
14 the building, ignoring the fact that there's a dock,
15 you valued the dirt at CV-6 at \$1,175,000 today,
16 correct? The total of that property?

17 A. Yeah. The total value of lot CV-6, yes, sir.

18 Q. Right. And excluding the docks, excluding the
19 gravel, excluding any signs on the property, we are
20 just talking about the raw land, correct?

21 A. Yes, sir.

22 Q. And you reached that value by looking at
23 comparable properties, and -- and most of us are
24 probably familiar with hearing the word "comps" as it
25 relates to real estate and appraisals; is that a fair

M. ROBINSON -- CROSS BY MR. EVANS

1 statement?

2 A. Yes, sir.

3 Q. And the comps you used were residential
4 properties, a couple in Mount Pleasant, and a hand full
5 on Daniel Island, correct?

6 A. Yes, sir.

7 Q. And when doing comps, when performing comps,
8 every property is unique so you have to make some
9 adjustments, correct?

10 A. Yes, sir.

11 Q. And then that's one of the special things
12 about real estate, each piece of property is unique,
13 correct?

14 A. Yes, sir.

15 Q. You have to make adjustments for size, first
16 of all, because one property might be 30,000 square
17 feet, and one property might be \$10,000, and you've got
18 to adjust -- do your best doing apples to apples,
19 correct?

20 A. Yes, sir.

21 Q. And you did those adjustments, correct?

22 A. Yes, sir.

23 Q. But you did them with residential properties,
24 correct? You didn't make any adjustments for the fact
25 that that property, CV-6 is designated civic, which

M. ROBINSON -- CROSS BY MR. EVANS

1 means you can't build a house on it, right?

2 A. That's correct.

3 Q. You didn't make any adjustments for that?

4 A. Correct.

5 Q. Similarly, you did the same thing with CV-5,
6 the parking lot that's up the street, correct?

7 A. Yes, sir.

8 Q. And that is a parking lot, there's -- some
9 brush has been cleared and maybe some of those concrete
10 parking things that your car butts up against to keep
11 you in a spot, there's some of those on the property.
12 But generally speaking, it's not landscaped. There's
13 nothing overly done about the property, correct?

14 A. That's correct.

15 Q. The comps you used for it were residential
16 lots in I'On, correct?

17 A. Yes, sir.

18 Q. And you performed that same function where you
19 adjusted square footage to do your best to make it
20 apples to apples, correct?

21 A. Yes, sir.

22 Q. You didn't make any adjustments or take
23 into -- take into consideration the fact that it's a
24 parking lot; it's designated as a civic spot, and can't
25 be used for a home, correct?

M. ROBINSON -- CROSS BY MR. EVANS

1 A. That's correct.

2 Q. It's not apples to apples when you're
3 comparing a residential property that somebody can
4 build their home on, and spend their life and treat
5 that as their life savings, as opposed to a parking
6 lot? Those aren't apples to apples, are they?

7 A. Do you want me to go back to the methodology
8 that's utilized in appraising this, as I did with Mr.
9 Young, and mention that again?

10 Q. Actually, what I'd like to do, can you get
11 Exhibit 145 on the screen for me. When performing your
12 comps for CV-5, the parking lot, you determined that it
13 was worth \$1,037,500 in today's dollars, correct -- in
14 today's market?

15 A. Yes, sir.

16 Q. Today's market also -- you'd agree with me
17 that a civic lot has fewer potential buyers than a
18 residential lot, correct?

19 A. That's probably true.

20 Q. Okay. If you could blow up where civic --
21 where CV-5 is on Exhibit 145; that's that landlocked
22 property right there, correct? Is that correct, Mr.
23 Robinson?

24 A. The land lot?

25 Q. Well, it's got land all around it, correct?

M. ROBINSON -- CROSS BY MR. EVANS

1 A. Well, it has access.

2 Q. Sure. It's got some roads. It's got a
3 little -- I guess maybe a sidewalk on the -- on the
4 high side of it, but it's got land all around it,
5 correct?

6 A. Well, it has land on two sides, yes, sir --
7 three sides.

8 Q. Do you know what's on the right hand side?

9 A. That's another subdivision.

10 Q. Okay. It's land? It's not water?

11 A. Right.

12 Q. If you could pull up CV-6, please. Whereas
13 this property, do you recognize that to be CV-6 on the
14 screen?

15 A. Yes, sir. It looks to be a portion of it,
16 yes, sir.

17 Q. And -- and that's on deep water, correct?

18 A. Correct.

19 Q. And you recognize -- you recognize this to be
20 CV-6, correct?

21 A. Yes, sir.

22 Q. That's -- that's on some deep water, somewhere
23 up here is the parking lot, correct?

24 A. Yes, sir.

25 Q. And what -- what you've told us today -- what

M. ROBINSON -- CROSS BY MR. EVANS

1 you've told this jury is that CV-6 is just as valuable
2 as the land lot parking lot up the street, according to
3 your comps?

4 A. Well, that's what the comps -- that's what the
5 sales pointed to be, yes, sir. It's a fair amount
6 larger than -- CV-5 was a fair amount larger than CV-6.

7 Q. Well, how much larger is it?

8 A. It's 5,000 square feet, 5,500 square feet.

9 Q. That's less than a tenth of an acre?

10 A. It's actually a little more.

11 Q. Just more than a tenth of an acre?

12 A. A little more.

13 Q. Okay. So the parking lot -- land lot parking
14 lot is about a \$100,000 less valuable than deep water
15 on the Hobcaw Creek?

16 A. That's what the comparable sales show, yes,
17 sir.

18 Q. I had an opportunity to take your deposition
19 about ten days ago, maybe, just before trial, correct?

20 A. Yes, sir.

21 Q. And at the time -- and you've addressed some
22 of this with Mr. Young -- at the time you had numbers
23 that were valued at right around \$1.77 million,
24 correct?

25 A. Yes, sir.

M. ROBINSON -- CROSS BY MR. EVANS

1 Q. And today you've told us that those numbers
2 increased by about \$230,000, correct?

3 A. Yes, sir.

4 Q. And the reason those numbers increased is
5 because of a survey, correct?

6 A. Yes, sir.

7 Q. You said that that survey was new information,
8 correct?

9 A. It was new to me, yes, sir.

10 Q. But it wasn't new information. Exhibit 220,
11 the survey, if we could get that on the screen, Ryan --
12 excuse me -- 220 -- 200. Sorry. If you could blow up
13 the date. What's the date of the survey?

14 A. March 2013.

15 Q. So it's actually been around for 15 months, if
16 my math is correct, something like that?

17 A. Yes, sir.

18 Q. Well, what you are telling me, and what you
19 are telling the jury, is your clients didn't give it to
20 you? It's not new, your clients just haven't given it
21 to you?

22 A. Correct.

23 Q. I gave it to you at the deposition?

24 A. Yes, you did.

25 Q. When making adjustments for neighborhoods and

M. ROBINSON -- REDIRECT BY MR. YOUNG

1 for individual properties, you take into consideration
2 things that are going on in the neighborhood, or that
3 make one piece of property different from another piece
4 of property, correct?

5 A. Yes, sir.

6 Q. You didn't make any adjustments for civic
7 usage, correct?

8 A. Correct.

9 Q. You didn't make any adjustments for a business
10 that's going on a property, correct?

11 A. That's correct.

12 Q. Did you make any adjustments for gang activity
13 in the neighborhood?

14 A. No, sir.

15 Q. Okay.

16 MR. EVANS: Thank you, Mr. Robinson.

17 **REDIRECT EXAMINATION BY MR. YOUNG:**

18 Q. Let's put up Exhibit 200, if you would,
19 please, Lee Ann, the survey. Now, Mr. Robinson, I
20 didn't mean to mislead anybody. It was new information
21 to you, correct?

22 A. New to me.

23 Q. All right. Exhibit 200 is a publicly recorded
24 document; can you tell by looking at it?

25 A. Yes, sir.

M. ROBINSON -- REDIRECT BY MR. YOUNG

1 Q. Look down there on the bottom. Tell me, it
2 looks to me like it was done by Palmetto Land
3 Surveying; is that right?

4 A. Correct.

5 Q. And then where is the recording from that
6 document -- the other side, I think, Lea Ann. What's
7 that -- is that where it shows that it's recorded or
8 that it was actually surveyed?

9 A. It was actually -- I don't see any recording
10 information. It's stamped by a registered surveyor,
11 but it doesn't show it being recorded in the
12 courthouse.

13 Q. Okay. And it was given to you by Mr. Lucey at
14 your deposition, right? Excuse me, Mr. Evans?

15 A. Mr. Evans, yes, sir.

16 Q. And if you look up there -- Lea Ann, if you
17 blow up the top right portion there -- number seven,
18 let's see who requested this survey and never recorded
19 it. Who requested this survey and had it done?

20 A. It was requested by Justin Lucey.

21 Q. The plaintiff's lawyer, right?

22 A. Yes, sir.

23 Q. It's not something that would have been
24 available to you by searching the public records or to
25 us by searching the public records until it is provided

M. ROBINSON -- REDIRECT BY MR. YOUNG

1 to us by the plaintiff's lawyer; is that correct?

2 A. As to the route of this document, I don't
3 know. But it's not a document that I could have
4 uncovered by going to the courthouse.

5 Q. Okay. And, Mr. Robinson, you have been
6 appraising property around Charleston County, the
7 tricounty area or whatever, for -- for about 40 years;
8 that correct?

9 A. Actually 45.

10 Q. Forty-five years. Have you done anything in
11 your analysis in this case, to try to somehow skew the
12 results to give some favorable treatment to the
13 Grahams, or to the I'On Company, or to us as lawyers,
14 or anything so that you would have some artificially
15 high numbers for the value that was given to the
16 Assembly in all the work that you did?

17 A. No, sir. I believe that's one of the reasons
18 I have been able to stay in business 45 years.

19 Q. All right. And there was some questions put
20 to you about the buy out or the options at end, and if
21 that would have changed your analysis, correct?

22 A. If I was asked to do an analysis on that, it
23 would change my value estimate.

24 Q. Sure. It would have changed the conclusion
25 you came up with, but it also would have changed how

M. ROBINSON -- REDIRECT BY MR. YOUNG

1 soon the Assembly got ownership of that -- that portion
2 of the land, correct?

3 A. Well, you know, the document I worked from, my
4 value estimate, was a settlement agreement.

5 Q. Okay.

6 A. And I worked directly off that and estimated
7 the value based on the components in the settlement
8 agreement. And there were -- if that would have
9 happened, if the buy out would have occurred, that it
10 would have had a chain reaction all through the value
11 estimate.

12 Q. All right. And then let's look at Exhibit 51
13 A, do you remember there was some suggestion that there
14 was some bad numbers you were given about the dock
15 costs and so forth in Mr. Evans' questions?

16 A. Yes, sir.

17 Q. All right. Let's look at -- Exhibit No. 51 A
18 is already in evidence, that the Jury is going to have
19 in the jury room with them. That's Defendant's 51 A,
20 please. Mr. Robinson, you mentioned that you were
21 provided with a document that details the cost of the
22 dock, but you didn't audit it, right?

23 A. Correct.

24 Q. All right. And I want to put on the screen
25 and make sure that there is a document that you were

M. ROBINSON -- REDIRECT BY MR. YOUNG

1 provided with, 51 A, Lea Ann --

2 A. Um --

3 Q. -- or do you have it in front of you?

4 A. I have -- I have the older one, the first one.

5 Q. Okay.

6 A. And also the second one.

7 Q. Let's look at the second, the more -- the more
8 current.

9 A. The more recent.

10 Q. Yes, sir. I can probably get it out of this.

11 MR. DUFFY: You are off one number, 50 A.

12 BY MR. YOUNG:

13 Q. All right, 50 A. All right. And if you'll go
14 to the second page -- my apologies, Lea Ann. Is this
15 the number and the document that you were working from
16 to come up with the valuation that you did?

17 A. Yes, sir.

18 Q. All right. And that's going to be with the
19 jury and is already in evidence in this case,
20 correct -- let me go to Defendant's Exhibit No. 167.
21 There was some questions about your failure to go to
22 the site, right?

23 A. Yes, sir.

24 Q. Now, Defendant's Exhibit No. 167 is a picture
25 of the Creek Club; does it look like it's in poor

1 condition from what you can see?

2 A. That's really not much of a photo to give me
3 -- it doesn't show me much -- the ramp looks good.

4 Q. But --

5 A. I can see the docks.

6 Q. Do I have it correct that in your entire
7 analysis, in 30 years from now, or whenever that will
8 get over to the Assembly, you didn't put any value --
9 zero dollars on that building?

10 A. Oh, the building. You're speaking of the
11 building?

12 Q. Yes, sir.

13 A. That's correct. I gave no revisionary value
14 to the building at all, as being one of the components
15 of the I'On Assembly.

16 Q. Okay. Nothing in your analysis puts any money
17 on that, correct?

18 A. Correct.

19 Q. All right. Thank you.

20 MR. YOUNG: I don't have any further questions.

21 THE COURT: Okay. Any follow up?

22 MR. EVANS: Nothing, Your Honor.

23 THE COURT: All right, sir. You may step down and
24 be excused.

25 THE WITNESS: Thank you.

1 THE COURT: Thank you. All right, ladies and
2 gentlemen, we have some significant legal issues we
3 need to work on in the case to prepare -- before we can
4 get it to you later today. I'm going to ask you to
5 return to your jury room for probably a little bit
6 longer break than we normally take. Please do not
7 discuss the case yet, as you have not heard the
8 arguments of counsel, and the charge on the law. And
9 I'm not sure if we're finished with all the testimony,
10 but I'm getting ready to find out from the attorneys.
11 Okay. Thank you very much. I appreciate your
12 patience.

13 (WHEREUPON, the jury leaves the courtroom at
14 11:00 a.m.)

15 THE COURT: We'll be at ease for about ten minutes
16 while y'all take a break.

17 (WHEREUPON, a break was taken.)

18 THE COURT: Okay. All right. Is everybody back.

19 MR. YOUNG: Yes, ma'am.

20 THE COURT: Okay. Ms. Bedell, I don't know if
21 your attorneys have had a chance to fill you in on
22 everything.

23 THE WITNESS: Yes, ma'am.

24 THE COURT: If you'll hop back up on the witness
25 stand, you are still under oath. Mr. Duffy has some

1 follow up that he needs to ask you out of the presence
2 of the jury, then we'll decide whether we have more
3 testimony we need to put on. Okay?

4 THE WITNESS: I understand. Thank you, Your
5 Honor.

6 THE COURT: Thank you very much. All right. Mr.
7 Duffy.

8 (WHEREUPON, the following testimony was taken
9 outside the presence of the jury.)

10 MR. DUFFY: Thank you, Your Honor.

11 BY MR. DUFFY:

12 Q. Good morning, Ms. Bedell.

13 A. Good morning, Brian.

14 Q. When did you first determine not to file suit
15 because the I'On company could veto it?

16 A. When did -- we did not have to make a
17 determination. The question never came -- never came
18 before the Board while I was serving on the Board.

19 Q. So it was never a part of your determination,
20 while on the Board, not to file suit against any of the
21 defendants because of the veto power?

22 A. The question did not come up. You asked me
23 yesterday about why the Board might not have filed
24 suit, when that decision might have been considered by
25 the Board; I was not a member of the Board at that

1 time.

2 Q. So -- and let's be clear about that -- in your
3 investigation, when you spoke with other people about
4 what had -- the history of it, you're not familiar with
5 any of them telling you they didn't file suit because
6 of the veto power?

7 A. The question didn't arise in my discussions.

8 Q. Okay. And it never arose in your term on the
9 Board; is that right?

10 A. Well, we were aware of the veto power, so even
11 if it had come up, we would not have thought about
12 filing a suit, because it would be so clear that it
13 would be vetoed.

14 Q. Okay. Well, that's a little bit different. I
15 think you told me before it never came up, whether you
16 would sue or not sue; is that right?

17 A. That's right. At that point, we were up to
18 our eyeballs in the lawsuit already.

19 Q. Right. And so you didn't determine -- you
20 didn't make a determination of whether to sue or not to
21 sue?

22 A. We were already defendants.

23 Q. Okay. So you didn't -- there was no decision
24 of yours that was impacted by a veto power; is that
25 right?

1 A. Not of the Board that I was a part of, that's
2 correct.

3 MR. DUFFY: Nothing further.

4 THE COURT: Okay. Any follow up from Mr. Bouch or
5 Mr. Lucey.

6 MR. BOUCH: Nothing from me, Your Honor.

7 MR. EVANS: No, Your Honor.

8 THE COURT: All right. I'm happy to let you have
9 additional cross-examination in front of the jury, or
10 I'm happy to do a jury instruction. Tell me how y'all
11 want to do it.

12 MR. DUFFY: I would just prefer an instruction to
13 have it back there, Your Honor, and let's move forward.

14 THE COURT: Okay. I think that's smart. Yes.

15 MR. LUCEY: In making that decision, Your Honor,
16 would the court mind sharing with the plaintiffs what
17 it foresees possibly instructing?

18 THE COURT: Well, I was going to ask y'all to
19 draft something and help me decide what to say. I'm
20 not just going to -- this is a moving target, as
21 everyone realizes. So we -- I need some help with the
22 language that you want me to provide as a jury
23 instruction. I mean, they heard me admonish the
24 witness yesterday, about testifying about what the
25 court might think or what other people had said.

1 MR. DUFFY: I think it would simply be there is no
2 evidence in this case that any Board member of the I'On
3 Assembly ever declined to bring suit because of a quote
4 "veto power".

5 THE COURT: Okay.

6 MR. BOUCH: Your Honor, may I ask one question to
7 Ms. Bedell that I think will --

8 THE COURT: Sure. Sure. Go ahead.

9 BY MR. BOUCH:

10 Q. Ms. Bedell, when you first got on the Board,
11 was the I'On Assembly already a defendant in this case?

12 A. Yes, we were.

13 Q. So, if it came before the Board on whether to
14 file suit, whether or not to file suit, is before your
15 time?

16 A. It absolutely was, yes, sir.

17 BY MR. DUFFY:

18 Q. Ms. Bedell, did it ever come before the Board
19 in executive session, or were there any minutes in
20 discussion about whether to join the plaintiff's suit,
21 or to bring some separate suit against the defendants?

22 MR. BOUCH: I'm going to object on the grounds of
23 privilege, Your Honor.

24 THE COURT: Overruled. What privilege?

25 MR. BOUCH: Your Honor --

1 THE COURT: Executive session privilege?

2 MR. BOUCH: He asked -- he asked for executive
3 session meetings, in which I briefed the Board, you
4 know, during the pendency of this lawsuit about this
5 lawsuit; and I object to those conversations. Any
6 other conversations, when I was not present or -- other
7 Board members were present, it's fair game.

8 THE COURT: He can ask if it came up in executive
9 session, discussing the lawsuit, not what advice Mr.
10 Bouch may have given, but if she knows. Okay.

11 MR. DUFFY: Thank you. Ms. Bedell.

12 A. I'm sorry. Would you rephrase or repeat the
13 question?

14 BY MR. DUFFY:

15 Q. I'll try -- try to get something close. Mr.
16 Bouch asked you when you came on Board, were you
17 already a part of this suit, right?

18 A. Yes, he did. And I said, yes, we were.

19 Q. And my question is, were there ever any
20 discussions among the Board members about whether to
21 join the plaintiffs against the defendants, or file any
22 other suit against the defendants that involved a
23 consideration of the alleged veto power?

24 MR. BOUCH: And, Your Honor, I'll renew my
25 objection, insofar as I was present in briefing the

1 Board.

2 THE COURT: Okay. Overruled.

3 A. When -- when we had any discussions about our
4 position in this suit, they were in executive session
5 because it was litigation strategy and our attorney was
6 present.

7 Q. Can I get a yes or no?

8 THE COURT: I just overruled that objection. That
9 means you need to answer the question.

10 A. I'm sorry, Your Honor, I thought that if our
11 attorney was present at the -- at the discussion, then
12 I thought that was the question that I was asked to --

13 THE COURT: Answer the question. Ask the question
14 again, please. I said not to say any advice Mr. Bouch
15 had given.

16 A. No, and I wasn't.

17 BY MR. DUFFY:

18 Q. Ms. Bedell, at any point on your service with
19 the Board, was there ever a -- considered by the Board,
20 in determining whether to join the plaintiff's action
21 against the defendants, or bringing any other separate
22 action against the defendants, whether or not you
23 should do it based on an alleged veto power that they
24 had?

25 A. No. There was no consideration based on that

1 issue.

2 MR. DUFFY: Thank you.

3 THE COURT: Okay.

4 BY MR. LUCEY:

5 Q. Ms. Bedell, did you ever discuss with other
6 Board members the existence of veto power that's
7 retained by the I'On Company?

8 A. Yes, I have, in particular because Mr. Vince
9 Graham sort of threatened it in a letter to us.

10 Q. Okay. So you and the Board are -- are aware
11 of that veto power?

12 A. Oh, very aware. It's in the CC&Rs, which are
13 recorded documents. And we ask all of our Board
14 members to become familiar with our governing documents
15 when they join the Board.

16 Q. And from time to time, does that affect
17 decisions that the Board makes?

18 A. It does.

19 Q. Does -- from time to time, does that overtly
20 or expressly get discussed in relationship to a
21 particular decision that may or may not be made?

22 A. Yes. We were -- had a compliance issue
23 recently where Mr. Vince Graham tried to intervene in
24 that matter, and we were very concerned that the
25 Board's ruling or position on that compliance issue

1 could be potentially vetoed by the founder.

2 Q. And from time to time, does that veto issue
3 come up implicitly -- in other words, you don't
4 expressly discuss the veto, because everybody knows
5 it's there, but somebody might just say, we are going
6 to have problems doing that?

7 A. I think it would be implicit because -- as I
8 said, Mr. Vince Graham mentioned it in a letter where
9 he demanded his rights under the governing documents to
10 receive advance notice of our agendas and minutes of
11 all of our meetings, even though they are already
12 publicly available, so that they could then review them
13 to determine whether they would exercise their veto
14 power.

15 Q. And, therefore, does this implicit
16 consideration of that veto power at times permeate your
17 discussions indirectly or -- or just because everybody
18 knows what the deal is?

19 A. Yes. It's always in the back of our minds,
20 exactly.

21 Q. And that's in -- with regards to almost any
22 action that the Board would consider taking, where it
23 might arguably have an interest that's adverse to the
24 I'On Company; is that correct?

25 A. Yes. Because my recollection of the veto

1 power is that the determination of whether something is
2 in the founder's adverse -- or against the founder's
3 interest is in their sole discretion, quote/unquote.

4 BY MR. DUFFY:

5 Q. Ms. Bedell, you don't know what other people
6 are thinking about this issue of whether or not to file
7 suit? You don't know if they are thinking about a veto
8 power because you didn't talk about that issue; is that
9 right?

10 A. I did not talk about the Board that would have
11 made that decision, no, or with the -- with the --

12 Q. Okay.

13 A. I was not on the Board.

14 Q. In the letter you're talking about from Mr.
15 Graham, when did -- when did you receive that?

16 A. Just this past year.

17 Q. Okay. So that didn't have any impact on any
18 decision prior to just this past year?

19 A. The veto power existed. He just happened to
20 draw our attention to it with a pretty sharp focus.

21 Q. Did you change any decisions that you were
22 going to make because of that letter?

23 A. Did I change any -- well, I instructed our
24 property manager to keep wasting money sending
25 everything by registered mail to him.

1 Q. Did you vote any differently because of that
2 letter?

3 A. I cannot recall a vote where that affected our
4 decision.

5 MR. DUFFY: Thank you.

6 THE COURT: Anything further?

7 MR. LUCEY: Not from the plaintiffs, Your Honor.

8 THE COURT: Mr. Bouch?

9 MR. BOUCH: Nothing, Your Honor.

10 THE COURT: Okay. I'm going -- let me read this
11 to y'all and see what you think. This is just
12 proposed: "There's no evidence in this case that the
13 I'On Assembly ever considered or discussed the veto
14 power that you have heard about in determining whether
15 or not to file a lawsuit in this matter. Any such
16 speculative testimony relating to this is stricken from
17 the record."

18 MR. DUFFY: I think so, Your Honor.

19 MR. LUCEY: Your Honor, I think, if I may,
20 obviously, for the record, the plaintiffs would like to
21 make sure it's in the record we object to any
22 instruction --

23 THE COURT: That's fine.

24 MR. LUCEY: But with regards to that instruction,
25 the plaintiffs would request that the court tailor it

1 much -- much more narrowly.

2 THE COURT: All right. Tell me how far you
3 suggest it be tailored.

4 MR. LUCEY: I would suggest that the court simply
5 instruct the jury that Ms. Bedell's testimony, that
6 they didn't file suit because of the veto power be
7 stricken.

8 THE COURT: Okay. That's fair.

9 MR. LUCEY: And I would request that it be done in
10 a context where it's not overly emphasized, a simple
11 matter of prior to resting the case.

12 THE COURT: Well, I'm not sure how we do that at
13 this point in the case, but we'll figure that out.

14 MR. DUFFY: I think that -- I think Your Honor's
15 charge is a much more fair, balanced charge based on
16 what has happened and what was testified to. And I
17 think the very limited one only draws attention to that
18 issue and basically in -- in a more negative way, for
19 instance.

20 MR. BOUCH: Well, Your Honor, I agree with Mr.
21 Lucey. The charge proposed by Your Honor was given --
22 I would delete the word "consider". It was not voted
23 on, agreed that -- as Ms. Bedell just testified, it was
24 always in the back of their mind.

25 THE COURT: Well, I'm not going to try to

1 speculate about what was in the back of people's minds.
2 A good portion of Ms. Bedell's testimony yesterday was
3 as we have heard in this court this week, or as we know
4 --

5 MR. BOUCH: I understand, Your Honor. Thank you.

6 THE COURT: And I could have cautioned her many
7 more times than I actually did, so I'm not getting into
8 that. But the issue, and it's an important issue in
9 this case, you know, as far as the derivative claims
10 go, Buddy Nicholson denied the motion to dismiss.
11 Markley Dennis denied the motion for summary judgment
12 and I'm getting ready to have to consider it on
13 directed verdict. What the Board considered and was
14 actually before them is significant. And as an officer
15 of the court, if you know of something that we need to
16 know that we haven't gotten testimony about, tell me.
17 But as far as I know, the Board -- or the Assembly
18 never considered, as a Board, the veto power or
19 discussed it in context with this lawsuit.

20 MR. BOUCH: Your Honor, the only point I made in
21 my examination of Ms. Bedell here a few minutes ago, is
22 when she became -- on the Board in 2011, the Board was
23 already a defendant. And any Board that would have
24 considered filing a lawsuit, and -- that was before her
25 time. And I think it -- it misleads the jury somewhat

1 to make a blanket instruction that the Board never did
2 it. And I -- I think that -- and that goes to my
3 concern. I understand --

4 THE COURT: No, that's fair. I mean, if she
5 wasn't on the Board, and a prior Board considered
6 something that was significant, we need to know about
7 it and why there wasn't any discovery about it.

8 MR. DUFFY: Well, the point is there's no evidence
9 about it, Your Honor, and the suggestion was otherwise
10 which is why we requested the instruction that you
11 suggested.

12 THE COURT: So your position is that the
13 plaintiffs did not put in any evidence that the
14 Assembly considered it before Ms. Bedell's time?

15 MR. DUFFY: Well, I don't know that that's -- I
16 don't know that that needs to be explained --

17 THE COURT: No, I'm not going to explain it.

18 MR. DUFFY: Ms. Bedell went through and said, I
19 went and met with other -- talked with other
20 presidents. I wanted to bring everybody up to speed on
21 everything that happened, and there is no evidence that
22 there was ever any consideration of that issue.

23 THE COURT: Okay. All right. Again, this is what
24 I'm going to say, and I note everyone's objection for
25 the record: "There is no evidence in this case that

1 the I'On Assembly ever considered or discussed the veto
2 power that you have heard about in determining whether
3 or not to file a lawsuit in this matter. Any testimony
4 from Ms. Bedell to the contrary is stricken from the
5 record" -- anybody got -- you still have an objection,
6 I know, Mr. Lucey; but does that narrowly tailor it
7 better for your purposes?

8 MR. LUCEY: No, Your Honor. We would just ask
9 that her testimony on the issue be stricken and -- but
10 the court's already ruled, and we accept that.

11 THE COURT: I need you to listen to my question.
12 Okay.

13 MR. LUCEY: Yes, ma'am.

14 THE COURT: You stood up and said that you had a
15 suggestion for how to narrowly tailor it, by not making
16 a blanket discussion, but discussing it in the context
17 of Ms. Bedell's testimony. That's what I just did, I
18 can read back what you said --

19 MR. LUCEY: Your Honor, my -- my request that the
20 court replace what it had said with simply an order
21 striking the testimony that the Board did not file suit
22 because of the veto power. The Court -- what the Court
23 just read to us, has a first sentence which is broader
24 than that, and says, there is no evidence in this case
25 that the Board did not do A, B, C or D. I -- I

1 don't -- I don't believe it would be appropriate at
2 this time for the Court to summarize to the jury what
3 the evidence is.

4 There are letters. There are demands to the
5 Board in evidence. There are responses in evidence.
6 There is -- there is Board activity, principally in the
7 late 2008, 2009 period that speaks for itself.

8 THE COURT: So your position is, we don't know
9 what the Board considered or didn't consider in
10 response to those 2009 through 2011 -- or whenever Ms.
11 Bedell came on the Board, but there may have been
12 activity, you just want her testimony stricken from the
13 record.

14 MR. LUCEY: Just the one thing they objected to,
15 which is her testimony they did not file suit because
16 of the veto power. That, we believe, would be narrowly
17 tailored to their objection, as opposed to making a
18 broader statement of summarizing the evidence in the
19 case, Your Honor. Yes, ma'am.

20 THE COURT: You know, there's really no way for me
21 to tailor this so that it doesn't comment on the facts,
22 which is of concern. And that -- this does bother me.
23 There is no evidence in the case that the I'On Assembly
24 ever considered or discussed the veto power, but I
25 don't know what happened in the Board meetings before

1 Ms. Bedell was there. And short of, you know, letting
2 y'all go do a bunch of discovery about it, I don't
3 really know how to fix that. The plaintiffs could put
4 that in. They certainly did put the letters in. I've
5 got to find a way to deal with Ms. Bedell's testimony.
6 Yes, sir.

7 MR. BOUCH: Your Honor, not to complicate things,
8 if the issue is the veto power, Mr. Lucey may be on the
9 right track when he says her testimony concerning the
10 veto power doesn't come in.

11 THE COURT: I don't want it -- all that does is
12 just remind them again about her testimony from the
13 veto power. It needs to be excised in some way that's
14 not prejudicial to anybody. I'm not sure there's a
15 great way to do that.

16 MR. LUCEY: Yes, Your Honor. And one of the
17 concerns, if the court would indulge me for just one
18 moment with me, please -- one of the concerns we have
19 is this: That veto power, regardless of what she says
20 about being used or considered, and whether or not the
21 court strikes that testimony, that veto power -- for
22 lack of a better word, is part of the res gestea of
23 this case. And let me give the court an example --

24 THE COURT: No, I understand. And I understand
25 him saying it was like the Supreme Court. I get that,

1 and I would be all over that in closing. And I'm not
2 directing a verdict on the derivative claims, just so
3 y'all know, regardless of her testimony. And I'll put
4 a bunch on the record about that, but go ahead.

5 MR. LUCEY: Well, one example I wanted to give the
6 court is this, Your Honor: People often argue -- or
7 developers will argue that, oh, we only had one person
8 on the Board of Directors; the rest were homeowners.
9 And, therefore, it was homeowner control. But
10 typically that one person is the president.

11 THE COURT: Right.

12 MR. LUCEY: And implicit in the office of
13 president is the control that emanates, so that -- that
14 veto is sitting up there. It may not be something that
15 is getting discussed every day, but it's always there,
16 and it's in the contract, and it influences people. I
17 mean -- and that's why we simply ask you to strike her
18 testimony rather than make an instruction about no
19 evidence in the case, Your Honor.

20 THE COURT: Okay. All right. Anything further,
21 Mr. Duffy?

22 MR. DUFFY: No, I think you understand our
23 position.

24 THE COURT: All right. Okay. Here's what I'm
25 going to say: "Ms. Bedell's testimony yesterday

1 concerning the veto power of the developer was
2 speculative, and there's no evidence in the case at
3 this point regarding what the Assembly considered. She
4 can only testify as to the term on which she served on
5 the Board. Okay. You are to strike that from your
6 consideration." I don't know how I could get any
7 closer to it.

8 MR. DUFFY: Well, Your Honor, I -- if I might, a
9 couple of things, when you say "no evidence in the case
10 at this point", I think that -- it's going to be --

11 THE COURT: That's the end?

12 MR. DUFFY: I don't think you need to say "at this
13 point". And, also, the end of it suggests that -- it
14 still suggests in her testimony, at a time of being on
15 the Board, that it is -- is that they considered it,
16 which they obviously did not.

17 THE COURT: I don't know if they ever considered
18 it. I do agree it was probably in the back of
19 everybody's mind. What the Assembly did or didn't
20 consider is hard to get to, because it's an Assembly
21 and it's a Board. What I -- what we've really got are
22 the pleas from various homeowners, asking the Assembly
23 to consider the lawsuit, and the kicking and screaming
24 that the Assembly put up, not wanting to get involved
25 in this. Okay.

1 I want the jury -- and they get it, they
2 understand. They heard me fuss at her yesterday. The
3 testimony needs to be stricken. There's no question
4 about that. It was speculative. There was no way she
5 could say what she said yesterday.

6 And you haven't had the appropriate discovery, I
7 don't think, to be able to challenge it. But I do
8 understand Mr. Lucey's contention, that the documentary
9 evidence that's properly in the record -- and it's
10 properly in the record whether admitted by the court or
11 stipulated, gives me pause to say there's no evidence
12 in the record. Because there is evidence from that
13 end, that it was put forth to the Assembly. Because we
14 weren't there and haven't had a witness from that
15 point, we don't know what the Assembly actually
16 discussed. So I'm trying to shorten this as much as
17 possible.

18 How about this way -- and I know y'all are never
19 going to agree. And I know Mr. Lucey objects, and I'll
20 note it again for the record, to any instruction on
21 this. "Ms. Bedell's testimony yesterday regarding the
22 veto power of the developer and the consideration and
23 deliberation of the I'On Assembly was speculative. You
24 are -- I am striking it from the record, and you are to
25 disregard it." How about that?

1 MR. BOUCH: Fine.

2 THE COURT: Okay. Noting the prior objections.

3 And Mr. Duffy --

4 MR. LUCEY: Thank you, Your Honor.

5 THE COURT: -- I note that you would rather have
6 the broader language, but.

7 MR. DUFFY: Yeah, Your Honor, I think that -- that
8 comes a little too close to what we were talking about,
9 drawing attention in a negative way.

10 THE COURT: Well, then, do you want me to not
11 instruct them on anything, and y'all can just argue
12 this out in closing? It's up to y'all. I think I drew
13 pretty good attention to it yesterday, when I
14 admonished her in the presence of the jury.

15 There's no way to bring them in and charge them
16 on this without ordering them just to strike her
17 testimony, at this stage of the case without drawing
18 attention to it, because there's no other witness to
19 put up. You know, I'll do it at any time that y'all
20 want me to do it, or will not do it.

21 MR. DUFFY: My thought at least, Your Honor, was
22 that would be just part of the final charge, rather
23 than call -- that might make it easier than calling it
24 out.

25 THE COURT: I think I need to deal with it before

1 we close the evidence in the case.

2 MR. LUCEY: Before the defense rests.

3 THE COURT: You know, but that's going to call it
4 out, so --

5 MR. DUFFY: The way you've framed it, Your Honor,
6 I would -- I think we need a charge. The way it's
7 characterized now, I prefer not to have anything.

8 THE COURT: Okay. All right. Then I will note
9 your objection to there not being a charge, and to the
10 time of it. And I'll allow y'all good leeway on that
11 in closing, to argue it as you see fit. I think we've
12 protected the record for when it goes up, but --
13 well -- okay.

14 MR. DUFFY: Thank you.

15 THE COURT: All right. Now, is the defense
16 planning to rest at this point?

17 MR. DUFFY: Yes, ma'am.

18 THE COURT: Okay. Let's talk about jury charges
19 and argue any other -- ma'am, you may step down. Thank
20 you -- argue any other directed verdict arguments that
21 you have? Any other arguments you want to put on the
22 record and we'll go from there?

23 MR. DUFFY: Thank you, Your Honor. I would
24 certainly renew everything that we had addressed
25 earlier, and it's in the brief. I think that a few

1 things that came out in Ms. Bedell's testimony are that
2 there was never a demand made, never anything placed in
3 front of the Board. Even she is a current
4 representative of the plaintiff indicates that there's
5 never been a proper demand on the Board and they never
6 made a decision based on it. I think that that --
7 that, obviously, is further evidence of our -- of our
8 directed verdict motion -- in support of our directed
9 verdict motion on the derivative claim, Your Honor.

10 THE COURT: Okay. Let me let Mr. Lucey respond to
11 that one, then we will move to the next one.

12 MR. LUCEY: Yes, Your Honor. There is documentary
13 evidence and there's testimony that the demands were
14 made, and there were a number of demands made. And, in
15 fact, Mr. Walbeck was present when Ms. Templeton made
16 her demand directly to the Board.

17 He, himself, later sent a demand on the Grahams,
18 which was forwarded to -- we know it was simply
19 forwarded to the Board because a reply came back, and
20 it was CCed to the Board. And we see e-mails where the
21 Board and the Grahams were discussing responses to
22 various demands, and those e-mails are in the record.

23 Ms. Adkins made a number of demands and made a
24 demand to the Board's attorney several times, that they
25 take action to secure these amenities, Your Honor.

1 The -- the -- as it turns out, apparently the --
2 as it turns out, apparently the Board was trying to get
3 some things done and the Board thought that the docks
4 were getting transferred to them. Then they get sold
5 out from underneath the Board, and the Board did not
6 take any further activity to secure these assets.

7 And the plaintiff gave -- the original
8 Plaintiff, Mr. Walbeck, gave them adequate time
9 afterwards to take further action. They did not and he
10 promptly filed suit. And, Your Honor, we believe the
11 derivative nature of this is completely supported by
12 the documentary evidence and the testimony in the -- in
13 the record.

14 And even though Ms. Bedell's testimony about
15 veto is -- has been stricken, the CCRs, covenants are
16 in the record with the veto power, that veto power is
17 described in the Property Report that we had the
18 witness testify about. That veto power lasts until the
19 year 2018. And so not only did we prove -- did we
20 plead futility for both plaintiffs, because these
21 demands had already been made and not responded to, but
22 the veto power itself also shows the futility. The
23 association would be unable to act. Tom Graham could
24 veto anything that they did. So, Your Honor, we
25 believe the derivative has been shown.

1 THE COURT: Okay. You know, with respect to Rule
2 23 (b) 1, and -- also with respect to the 23 (a), which
3 deals with class actions, this is not a class action.
4 I think the spirit of the Supreme Court's rulings on
5 class actions covers these derivative claims as well.

6 South Carolina takes a very broad view, when you
7 compare its analysis. And the language of the Rule 23
8 itself, as opposed to the more limited federal rules,
9 so looking at this particularly in light of public
10 policy of the state, but in the facts as presented in
11 this case, the requirements of 23 (b) 1 were met.

12 I looked at the 4th amended complaint and from
13 Rule -- paragraph 38 through 48, demands were made by
14 several homeowners, not just the plaintiffs in this
15 case, but several homeowners on the Assembly to take
16 some sort of action regarding the -- for lack of a
17 better word, promises as had been alleged in this case.
18 And really nothing was done other than to say, we are
19 referring Ms. Adkins to our attorney, Tim Bouch.

20 She wrote him a letter, you know, she --
21 there's not a whole lot you can do as an individual
22 person that carries more weight than be referred to
23 somebody's lawyer, and make a demand upon that lawyer.
24 And we see Mr. Bouch's response back to her.

25 I don't know that the Board even understood what

1 actions it could have taken. Quite frankly, Ms.
2 Bedell's testimony, not the stricken part, confirmed
3 that. It didn't know what to do, and it wasn't going
4 to do anything.

5 You know, on one hand, we've had the very cogent
6 standing argument that Mr. Whitaker presented regarding
7 the standing of Ms. Adkins and Mr. Walbeck to even
8 bring this matter, and the efforts on a motion to
9 dismiss before Buddy Nicholson, motion for summary
10 judgment before Judge Dennis. And, now, to get the
11 derivative claim set aside so individual plaintiffs
12 don't have standing, there's no satisfaction of the
13 derivative requirements. And then you have Ms. Bedell
14 say, well, the Board couldn't have acted, because the
15 promises were made the landowners. That is not the way
16 this works.

17 It can't be set up as lesson in futility, that
18 no person, whether an individual buyer or the -- their
19 Assembly, which owes them a fiduciary duty, that none
20 of these people have a remedy. That is not the way the
21 law works. The pleading requirement was met. Multiple
22 demands were made upon the Board, not only by these
23 particular individuals, but by other homeowners. The
24 Board was not going to do anything, nor did it even
25 understand from the testimony that's been presented,

1 what it could do; and the futility option is satisfied
2 as well by the evidence presented through Ms. Bedell
3 and otherwise. And also because of that veto power,
4 that Mr. Graham has testified to, in regarding how
5 powerful indeed it was.

6 So that motion for directed verdict is denied.
7 Talk to me about breach of fiduciary duty, because I --
8 that's a much closer question. Mr. Whitaker.

9 MR. WHITAKER: Do you want me to go first?

10 THE COURT: Sure.

11 MR. WHITAKER: I'll be happy to, but he filed kind
12 of a cross motion.

13 THE COURT: Well, no, I have read both of your
14 briefs, but -- and I heard the arguments yesterday.

15 MR. WHITAKER: Well, Your Honor, just very
16 briefly, we think that Goddard and Concerned Dunes West
17 are pretty narrowly focused, and I think Concerned
18 Dunes West essentially. I mean -- there's a certified
19 question, the Supreme Court says very specifically, the
20 district court wants to know whether or not we have a
21 specific rule about if the common areas are turned over
22 in poor condition, they ask them to bring them up to
23 snuff, and they say "yes", we hold today that this is
24 the law in South Carolina; this very specific point.
25 That's what Concerned Dunes West and Goddard are about.

1 We don't think there is any reason to think that should
2 be extended to a broad duty about everything. And
3 that's where we are.

4 THE COURT: Well, not a broad duty, but -- well,
5 I'll let Mr. Lucey --

6 MR. WHITAKER: And I will say one other thing --
7 I'm sorry -- this is kind in response to his brief, I
8 apologize.

9 THE COURT: Okay.

10 MR. WHITAKER: The last section of it talks about
11 alleged breaches of duty. And I know we have some
12 differences about who's got control of what, when and
13 what-not; but all these things, after it was all
14 homeowners on the Board, that it's talking about saying
15 that these representations were made. That may or may
16 not be breach of duty. I just wanted to point that
17 out.

18 THE COURT: You mean, it happened after Chad
19 Besenfelder was off the Board, but before the Grahams
20 put him back on there?

21 MR. WHITAKER: Yes. Yes. In page six of their
22 brief, in part three, all acts they are talking about
23 are things that happened after '05, when Legrand
24 Elebash went off the Board, and there were no developer
25 appointees, and before Mr. Besenfelder went back on in

1 2014. In '08 and '09, there were developer
2 representatives on the Board.

3 THE COURT: Okay. Mr. Lucey?

4 MR. LUCEY: Yes, ma'am. Working in reverse order,
5 just for a second, to make sure the court clearly
6 understands the plaintiff's position. The presence of
7 a developer representative on the Board is simply a
8 second ground to assert the fiduciary duty. Because we
9 all know Board Directors have fiduciary duties to the
10 entity they serve on. That's just a second ground, a
11 more specific ground.

12 The larger ground, Your Honor, arises out of the
13 developer, of responsibility that's akin to the
14 corporate promoter responsibility that was described at
15 length in the Duncan case. And our courts long ago
16 analyzed that when you create a corporation, you are in
17 a position of trust to the people you created it with,
18 and to the ensuing entity. You can't screw the
19 corporate entity that you are creating or your
20 partners.

21 And in Goddard, the court simply realized that a
22 developer of a subdivision, a neighborhood, is the
23 exact same thing. That they are going to create this
24 new entity, and it's going to have an entity, an
25 association, so they're not just creating a

1 neighborhood, but creating an association. And that
2 the developer owes fiduciary duties to the new entity
3 and the association. Because, by its very nature,
4 those new entities are relying -- implicitly relying on
5 the developer to do his job properly, and create a
6 proper homeowners association and a proper
7 neighborhood, and a place where people can actually
8 live and go into the future. And so they have set
9 forth a broad fiduciary duty for the developer to that
10 neighborhood and to that association.

11 They want to talk about Dunes West. Dunes West
12 just explored one aspect of that broad fiduciary duty.
13 And in that context, the court said obviously -- we all
14 know -- when you turn over amenities to this
15 association, that you owe these duties to, you have a
16 duty to turn them over in good repair, or give them the
17 money to make them in good repair. But Dunes West,
18 there's no weight on a limitation on the fiduciary duty
19 that was examined in Goddard.

20 In this case, Your Honor, what's interesting
21 among other things -- we've been arguing about the veto
22 power today, the veto power is still there. They, as a
23 matter of law, still control this association like the
24 Supreme Court.

25 Secondly, if we look in the e-mails, the

1 confidential e-mails that are in evidence between the
2 developers, that we're not a party to until we get them
3 in discovery in this case, we see how they are
4 conniving to screw the association. Can we get away
5 with giving them this little sliver and argue this
6 isn't in the governing documents, or do we have to give
7 them that little sliver, how can we leverage this.
8 They are using a position of superiority, a position of
9 more knowledge to take advantage of the HOA that has
10 ensued from this development.

11 And Mr. Graham testified that they still have
12 two residential lots that have not been built, and they
13 still have two or three civic lots that have not been
14 built, they have -- they are still building in this
15 neighborhood. It is, in fact, still being developed.
16 It has not been built out.

17 And we heard that the exercise -- influence or
18 control over the Boards, they are in a position where
19 they have control, direct or indirect, and they have a
20 position of responsibility; and they had a position to
21 deal with the homeowners association and the homeowners
22 at arm's length. They did not do this -- their e-mails
23 show it.

24 One of their e-mails, "I'm just playing with
25 them", talking about the Board member -- "I'm just

1 playing with them. Watch how I shut the door in his
2 face", the next two e-mails.

3 Another e-mail, "Let's get rid of this Mickey
4 Mouse business with the association", on and on. And
5 they were using their superior position, their implicit
6 control, their superior knowledge, the homeowners
7 associations' reliance on them to their advantage, at
8 the expense of the homeowners. And, Your Honor, we
9 would respectfully submit this is a classic, classic
10 breach of fiduciary duty.

11 And, Your Honor, frankly while we are on it, and
12 so we don't argue twice, we have cross moved for a
13 directed verdict on this. We believe that the evidence
14 is clear, and we've -- we've shown that they did --

15 THE COURT: Well, the plaintiff's motion for
16 directed verdict on fiduciary duty, breach is denied.

17 MR. LUCEY: Yes, ma'am.

18 THE COURT: I have read your brief. Anything
19 further, Mr. Whitaker?

20 MR. WHITAKER: Just one other point about Goddard,
21 Your Honor, interestingly right before the part that
22 we've really been talking about, it's at 414, there is
23 some talking about voting strength. And it says
24 specifically, that the business judgment rule applies,
25 even to a developer appointee, who is on the Board.

1 It's not what they might be thinking, or what the
2 threat of -- it's what they actually do as a member of
3 the Board. And there are duties owed based on their --
4 they've got business judgment freedom to exercise their
5 role on that Board. They have a duty, as a member of
6 the Board, if they're on it, but they have business
7 judgment freedom as well --

8 THE COURT: I agree with you on that, and that's
9 probably why this is an issue of fact for the jury and
10 not for me to rule on as a matter of law. When a
11 developer creates a Board and inserts itself on that
12 Board, whether by having a person actually on the Board
13 or by retaining a veto power of anything the Board
14 does, and then attempts to deal with someone like Bruce
15 Kinney, while having other issues going on it, it may
16 may have bought itself a duty that otherwise would not
17 exist. But it's a close enough question and a close
18 enough issue of fact, that this issue needs to go to
19 the jury to determine. So I'm going to deny the cross
20 motions for a directed verdict on breach of fiduciary
21 duty. Okay.

22 Now, Interstate Land Sales Act, I think that the
23 disclosure portion would be barred by the three year
24 statute of limitations, which runs from the date of
25 contract. However, I believe the plaintiffs also plead

1 the fraud misrepresentation portion of ILSA, which goes
2 to the discovery rule. So talk to me about that, if
3 you like.

4 MR. WHITAKER: Oh, I certainly agree, ILSA has a
5 discovery rule in it, and it reads basically the same
6 as our state ones, so it seems to have the same
7 applications. So just as far as limitations goes, yes,
8 I'm with you on that.

9 THE COURT: Yes.

10 MR. WHITAKER: Do you -- more about the rest of
11 ILSA?

12 THE COURT: Well, I just need to know -- I think
13 that one of the verdict forms -- and I do believe this
14 is going to need to be in the verdict form, as
15 complicated as it may be for the jury to go through the
16 documents, is Mr. Duffy and Mr. Whitaker and Mr.
17 Young's inquiry about when the trigger dates are, for
18 what the Assembly and the representative/plaintiffs
19 knew and when they knew it, and that may be pertinent
20 to the ILSA claim as well.

21 MR. WHITAKER: I think it's particularly
22 important -- and I don't have the cases right in front
23 of me, but I think even as opposed to a breach of
24 contract claim, the ILSA law is very clear, that you
25 don't get any extrinsic evidence. You have got to look

1 at what the report actually said. And going just on
2 that, you know, did you get what it said you're
3 supposed to get.

4 And going just on those words, in the report
5 itself, community dock, Creekside Park, you know, we've
6 argued until the cows come home all week about what
7 those words mean, and maybe the contract issues were
8 different, but under the ILSA case law, that's -- that
9 --

10 THE COURT: Well, is that Judge Norton's case?

11 MR. WHITAKER: Yes, ma'am. And we think that
12 under that, I mean -- that's what you got to go on, is
13 what those words actually say. And they got, in the
14 dictionary meaning of those words, a dock for the
15 community, and they got a park by the creek that are in
16 phase II. So, I think just based on that --

17 THE COURT: So you don't bring in extrinsic
18 evidence as far as what they were told; what the
19 marketing materials said; what the real estate agent --
20 agents said; none of that comes in with respect to the
21 ILSA claim?

22 MR. WHITAKER: Under Gibbs, yes, Your Honor.
23 That's what we believe.

24 THE COURT: All right. Talk to me about that.

25 MS. LYNN: Your Honor, that's with regards to the

1 disclosure provisions.

2 THE COURT: Yeah, but that's part of the fraud
3 claim as well.

4 MS. LYNN: If you read Gibbs very carefully, Gibbs
5 actually involved two plaintiffs, Gibbs and Traveno.
6 When it came to the disclosure provision decision that
7 the Gibbs court put down, when it came to Gibbs, they
8 said, oh, well, you didn't buy from the developer, so
9 your claim can't proceed.

10 The court went on to note that if, in fact, his
11 claim would have proceeded, the advertisements that
12 were distributed by the developer, would have been
13 enough to establish a question of fact under the
14 antifraud provisions.

15 With regards to the second Plaintiff, Trevino,
16 they actually let his claim proceed. Because there was
17 a question of fact as to whether the developer's agents
18 materially misrepresented the size of an equestrian
19 center to him orally, prior to his purchase of the
20 property. We have the exact same questions of fact
21 here, our antifraud provisions, our claim should
22 proceed to the jury as to both Walbeck and Adkins.

23 MR. LUCEY: And one fact that I would like to add
24 for the court's attention, Your Honor, Julie Hussey
25 testified that one of the reasons there was no

1 ambiguity about Creekside Park in the HUD Report, is
2 that there was one creek. There was only one park.

3 THE COURT: Well, I understand. I understand.

4 MR. LUCEY: And -- and her -- she is collaborated
5 by Exhibit 86, the defendant's application to the state
6 and federal governments, where they don't say the other
7 five docks are on a creek, they say it's on an unnamed
8 tributary. So there is no ambiguity in Creekside Park.
9 It's Hobcaw Creek.

10 THE COURT: Okay. As I indicated, the statute of
11 limitations bars the disclosure claim under ILSA.
12 However, the antifraud claim, the discovery rule issue
13 that the jury is going to have to deal with on the
14 verdict form, will apply to that as well, and there is
15 an issue of fact with respect to that, that will take
16 it to the jury.

17 Okay. Amalgamation, we need to talk about
18 because by virtue of the verdict forms that have been
19 submitted by everybody, y'all aren't on the same page
20 with me regarding amalgamation. As I read the cases,
21 the Kincaid case, the Pope and Magnolia cases, that is
22 an issue of law for the court to decide the
23 amalgamation; am I wrong?

24 MR. WHITAKER: That's what we believe, Your Honor.

25 THE COURT: Okay. Then so, there's not going to

1 be an amalgamation question on the verdict form. All
2 right.

3 Now, I assume y'all want to argue that there's
4 been no amalgamation, defendants, and I know that the
5 plaintiffs will want to argue that there is. If you
6 want further argument on that, I'm happy to hear it.
7 I've been brief, but that's entirely up to y'all.

8 MR. WHITAKER: Your Honor, I think we stand on the
9 brief. We think there may be a nomenclature issue, is
10 amalgamation really different from alter ego. I'm not
11 sure, but the court is well aware of what all those
12 different types of claims are.

13 THE COURT: Okay.

14 MR. LUCEY: Your Honor, my reading -- and I
15 apologize, I'm sure I could be wrong -- but my reading
16 of those three cases is that actually the amalgamation
17 was present in the jury verdicts. The court agreed
18 with the jury, but that was my reading of it.

19 THE COURT: Well, guess what, the best part about
20 my new job is, I have access to records on appeal on
21 the computer that I didn't have before. And I've got
22 Cliff Newman's verdict forms from the Pope case, so
23 come on up and take a look at them. I'm not going to
24 say that that's what I'm going to use. But so far,
25 that's my favorite part of my new job, so there you go.

1 And I'm kidding. I love my new job, but that is very
2 helpful to have.

3 He just gave them one verdict for the class
4 action and one verdict form for the individual folks.
5 No amalgamation questions on that verdict form. I
6 haven't pulled the other ones yet.

7 MR. LUCEY: Yes, Your Honor, and frankly, although
8 I'll be honest, my verdict form set forth the
9 amalgamation question separately because my staff did
10 it. And I said, okay, that's reasonable. But
11 previously, when we've -- when I've been involved, we
12 simply list the entities, and the jury will decide
13 which ones are liable. And, obviously, if they pick
14 all four, they may have decided amalgamation. If they
15 don't pick one, they may have rejected amalgamation.

16 THE COURT: And I'm fine to do it that way. If
17 y'all want to do it that way, that's -- that's how the
18 defendants propose to do it.

19 MR. LUCEY: That's fine with me, yes, ma'am.

20 THE COURT: Okay. Then we will take the
21 amalgamation itself off the verdict form, but submit
22 the verdict forms the way the defendants crafted that
23 part of it regarding the various entities.

24 MR. LUCEY: If you'll just check which ones --

25 THE COURT: Sure. I'm happy to let them do it

1 that way. Any objection from the defendants?

2 MR. WHITAKER: Actually, I think it was --
3 actually, maybe, Mr. Lucey that had the different check
4 boxes, because we had the four separate forms. I get
5 that gets really lengthy, and the check boxes are fine.

6 THE COURT: Okay. Great. I would rather one --
7 we are going to have to streamline it. It's
8 complicated any way we do it.

9 All right. What else do y'all need to do to
10 protect your record with respect to the motions for
11 directed verdict? I'm going to note your prior
12 arguments that have been considered and the briefs that
13 everybody has filed.

14 MR. DUFFY: Your Honor, just a couple of quick
15 things. On the statute of limitations, I think that
16 one of the big -- one of the more important
17 developments since our last argument was Ed Clem's
18 testimony and his involvement with the recreational use
19 easement, and everything else, in -- as early as 2004.

20 Your Honor, going back briefly to what you had
21 given as a ruling on the derivative action, and I just
22 wanted to make a couple of quick -- at least
23 clarifications of our position based on Your Honor's
24 ruling.

25 One of the things that you mentioned is that the

1 Board didn't have an understanding of what was going
2 on, or what they needed to do, or what was being
3 presented. And I think that's one of the requirements
4 of demand on the Board, is you have to lay out exactly
5 what it is --

6 THE COURT: Oh, I agree with that, but you have to
7 have an un-idiot (phonetic) Board to be able to deal
8 with it, and that's basically what my point was. So
9 you don't need to put anything else on the record.

10 MR. DUFFY: Okay. Just quickly, Walbeck, when he
11 made his demand -- alleged demand on the defendants, he
12 already had an attorney, as is reflected in the record.
13 Mr. Tisdale was representing him. And I believe Your
14 Honor cited a fourth amended complaint, for what it's
15 worth, I don't think that's verified.

16 THE COURT: Okay. Well, actually their
17 verification is online. It was filed. I don't know if
18 they were provided to Mr. Duffy or not.

19 MR. LUCEY: My staff told me that they were served
20 and I have copies --

21 THE COURT: I know, I mean, I've got them.

22 MR. DUFFY: I apologize if that's --

23 THE COURT: They may not have been given to you
24 with the complaint, which in an ideal world would have
25 been the way to do it. But they are in the -- in the

1 court file. But I don't think -- the date on which
2 they made it onto the screen, I think y'all were
3 probably all pretty busy by the time that happened. So
4 they may not have been verified at the appropriate
5 time, and I'll certainly note that objection for the
6 record.

7 The problem with the way that this case has
8 proceeded is, this fourth amended complaint came after
9 the Board had been dragged kicking and screaming into
10 this whole mess, so I'm inclined to be a little more
11 lenient than perhaps the rules intends, due to the
12 unique circumstances of this case. That will certainly
13 be an issue y'all will have -- that y'all can argue
14 about up the road.

15 Okay. Abuse of process, I'm imagining we need
16 --

17 MR. LUCEY: The plaintiff moves for a directed
18 verdict on that, Your Honor. There's been absolutely
19 no -- let's talk about Mr. Walbeck first. There's been
20 absolutely no evidence of any improper use of process
21 by Mr. Walbeck.

22 There's been no linking of Ms. Templeton to
23 anything going on in this courtroom. He didn't call
24 Ms. Templeton. He didn't put on any evidence there has
25 been any communication between these people. They

1 never deposed Ms. Templeton. They never deposed or --
2 or they didn't call some of the other people who they
3 kept throwing names out to the Court. There's
4 absolutely no evidence to support the abuse of process
5 counterclaim, Your Honor, as to Mr. Walbeck.

6 As to Ms. Adkins, it's tenuous. They can say
7 she was a part of a BOZA appeal two years ago, that
8 doesn't rise to the level necessary to prosecute an
9 abuse of process claim, Your Honor. And so that claim
10 should be dismissed, too. Thank you.

11 THE COURT: Okay.

12 MR. DUFFY: Your Honor, for what it's worth, both
13 swore to facts in the verified complaint that they
14 didn't know, that's enough right there. If we want to
15 continue to arguing the facts of whether they were
16 linked to these other people. Exhibit 105 shows
17 exactly what it is when they were saying, hey, let's go
18 find someone who got this directly. And, incidentally,
19 it's not -- hey, Lea Ann, you got this, how about you
20 go bring this suit. It's let's go find somebody and
21 I'd be happy to --

22 THE COURT: No. I think -- you know, part of
23 their linkage to one another is why I'm allowing the
24 derivative claim to go forward. The problem here is I
25 don't think there's been evidence presented as to Ms.

1 Templeton or Ms. Adkins or Mr. Walbeck, that will --
2 anybody took any improper act, not in the furtherance
3 of the process. Opposing the zoning for something such
4 as has been presented here, is not an abuse of process.
5 The fact that the current BOZA, as constituted, ruled
6 the way they ruled, and Ms. Templeton backed down in
7 light of a letter threatening to sue her, doesn't make
8 any of that an abuse of the proper process.

9 Even if the supposed ulterior motive was to
10 scuttle the sale to Mike Russo, in light of the context
11 of this lawsuit, there's not enough to go to the jury
12 to show that that was an improper motive in light of
13 the evidence that's come in, in this trial. There's
14 just not an issue of fact that there's been any abuse
15 of the proper process by these plaintiffs.

16 I understand the defense's theory of the case.
17 You got to play the hand you've been dealt, and I
18 understand that. But I don't see it here. Every time
19 somebody files a lawsuit or unsuccessfully opposes a
20 zoning that, quite frankly, is suspect as I explained
21 earlier regarding the civic use of CV-6, and the
22 carnival like atmosphere that Mr. Walbeck described --
23 or somebody described as far as the trolley and the
24 buses on the tiny little street in I'On, which are hard
25 to negotiate in a regular car, you know. That's just

1 not an abuse of the lawful process such that it goes to
2 the jury. Okay.

3 MR. DUFFY: Might I, Your Honor?

4 THE COURT: Yes.

5 MR. DUFFY: Just a couple things. I believe that
6 there's evidence showing that they verified facts to
7 this court to keep this case alive, that they -- that
8 they did not know at the time, and certainly never
9 found out after the deal. So as far as falsely -- I
10 mean, it's -- I'll just keep going.

11 As far as the zoning issue is concerned, Your
12 Honor, I just want to make clear -- our issue about the
13 zoning, isn't that that challenge was improper, it is
14 you -- their story is, we -- this was the place. We
15 relied on it. We knew it was going to be ours. And
16 when they were told it wasn't, they just tried to go
17 through zoning. There's no Property Report. Nobody
18 talks about any of that --

19 THE COURT: Told that it wasn't? By who?

20 MR. DUFFY: I'm sorry?

21 THE COURT: This is ours, but we are told that it
22 wasn't?

23 MR. DUFFY: When it was sold, when there was a
24 sale, their first reaction was not, that is ours and it
25 was promised to us, here's my report. It was, let's go

1 see if we can change the zoning. And when that didn't
2 work, Ward Mundy's e-mail says, maybe we can find
3 somebody with a '98 Report. And that is, Your Honor,
4 the suggestion that Ms. Adkins never had that report.
5 She was right there on that e-mail. They found
6 Mr. Walbeck. He sat with her at the zoning. It was
7 all -- this '98 Property Report argument only comes up
8 after their initial reaction -- not, hey, that's mine.
9 It's, hey, let's see if we can change it around a
10 little bit --

11 THE COURT: Okay.

12 MR. DUFFY: I think it is an abuse of process.

13 THE COURT: And I respect your opinion and
14 appreciate your zealous advocacy for your clients, but
15 I'm going to grant the motion for a directed verdict on
16 that. All right. What else?

17 MR. LUCEY: The plaintiff moves for a directed
18 verdict on the affirmative defenses set forth in the
19 answer to the fourth amended complaint on page 9, and
20 at the top of page 10. While we move on all of them --

21 THE COURT: Well, list them out for me for the
22 record, because I'm not --

23 MR. LUCEY: All right. Failure to state a claim.

24 THE COURT: Okay. Denied.

25 MR. LUCEY: We move for a directed verdict on the

1 lack of standing, jurisdiction.

2 THE COURT: I -- I granted a directed verdict --
3 or I denied the defendant's motion for a directed
4 verdict as to standing. They are not going to --
5 that's no longer an issue.

6 MR. LUCEY: Okay. And we move for a directed
7 verdict as to the statute of frauds.

8 THE COURT: I don't even know that that came up
9 during the trial. Did it? Did y'all present any
10 evidence with that?

11 MR. DUFFY: I'm sure that Mr. Eble even conceded
12 that anything that he was -- any property being
13 transferred has to be in writing, the specifics of it.

14 THE COURT: All right. That motion is denied.

15 MR. LUCEY: We move for a directed verdict on
16 unclean hands.

17 THE COURT: Denied.

18 MR. LUCEY: Directed verdict on waiver.

19 THE COURT: Denied.

20 MR. LUCEY: Plaintiff's also move for a directed
21 verdict on all other causes of actions against the
22 defendants. And while I'm happy to argue it, I
23 understand the court would probably deny it, and that
24 should save the court the time.

25 THE COURT: You know, motions for a directed

1 verdict, I understand you have to make those to protect
2 your record going forward. A lot of times plaintiffs
3 don't want those motions granted, because it just buys
4 another issue for appeal. There's been abundant --
5 there are a lot of factual disputes here, and that's
6 exactly what the jury has to determine. And,
7 thankfully, I do not. So, respectfully, I'm going to
8 deny plaintiff's motions for a directed verdict.

9 MR. DUFFY: Your Honor, if I might add?

10 THE COURT: Sure.

11 MR. DUFFY: We moved for a directed verdict on --
12 on the issues of the easement being valid. They've
13 been operated under, as Ms. Bedell tried to say, now
14 that she's bound to say -- try to cooperate being
15 invalid -- everybody has always operated under them.
16 They are valid.

17 And the perpetual issue, Your Honor, is what
18 we've been talking about, be -- everybody's
19 representing --

20 THE COURT: Right. And I understand that. And I
21 know that's been a strange issue in this case,
22 paragraph 4.2 that talks about how the issue -- the
23 easement is not perpetual is of concern to me, despite
24 the other contentions after the first settlement. But,
25 you know, I'm not so sure about how they -- even in

1 writing, to have the easements the way they were, when
2 you got Mike Russo putting up signs that say, nobody
3 can come here. I don't think anybody understood how
4 those easements were working.

5 And everybody was doing the best they could to
6 negotiate something without all the knowledge of
7 whatever everybody else had going on at the time. I'm
8 going to deny the motion for directed verdict, or to
9 take judicial notice of that. Y'all are free to argue
10 that however you like in front of the jury. Okay.

11 MR. DUFFY: And, Your Honor, does that cover the
12 validity issue as well?

13 THE COURT: That -- I just, you know, the easement
14 as written, which I guess has now been merged, because
15 that's been dealt with. But you had the language
16 saying it was perpetual. You had 4.2 saying it wasn't.

17 And then I've got what Mr. Bouch represented on
18 behalf of the Assembly. But I never heard that from
19 the defendants. And I never heard that from the
20 individual plaintiffs. So this is -- I'm not making
21 any ruling as a matter of law about the easements. I'm
22 happy to hear y'all on that, Mr. Lucey.

23 MR. LUCEY: Well, we moved for a directed verdict
24 on the consolidated complaint, saying that it is valid
25 and is perpetual. Clearly, it's recorded out of time,

1 six months late. There's never been a corrected deed.
2 So as a matter of law, that easement was invalid ab
3 initio.

4 And, secondly, we move for a directed verdict in
5 that consolidated case on the issue of mergers, so it
6 is now merged and it's no longer in existence, and we'd
7 ask the Court to award us a judgment on both of those
8 claims.

9 THE COURT: I'm going to deny the cross motions
10 for directed verdict regarding the easement. Okay.
11 What else?

12 MR. DUFFY: Nothing from us, Your Honor.

13 THE COURT: Nothing further. All right. Do y'all
14 need a quick break before we talk about jury charges or
15 can we keep going?

16 MR. LUCEY: A five minute bathroom break would be
17 nice.

18 THE COURT: Okay. And, Sharon, if anybody needs a
19 break, we'll be at ease five minutes.

20 MR. DUFFY: Your Honor, what do you think about
21 scheduling this -- I was thinking about...

22 (Discussion off-record concerning scheduling.)

23 THE COURT: I'm assuming there's no reply
24 testimony?

25 MR. LUCEY: No reply, Your Honor.

1 THE COURT: Anybody object to doing it that way?

2 MR. DUFFY: No, ma'am.

3 THE COURT: All right. Well, y'all take about
4 five minutes, and then we'll do the charges, then I'll
5 let y'all go for lunch for a little while, and then
6 come back to do closings. Okay. Thank you.

7 (WHEREUPON, a brief recess was taken.)

8 THE COURT: All right. Let's just start with the
9 plaintiff's charges first, and go through them in
10 order.

11 Number one explains what a derivative action is.
12 And I understand that we are just looking at the
13 language of the charges, not any argument on whether
14 that's a valid issue to go forward or not. I think
15 y'all already pretty well objected to everything as to
16 those. Seth, are you arguing the charges?

17 MR. WHITAKER: Yes, ma'am.

18 THE COURT: All right.

19 MR. WHITAKER: You know, number one, it explains
20 why a derivative action is, which it seems appropriate.

21 THE COURT: You don't have to stand up, unless you
22 just want to.

23 MR. WHITAKER: I may out of habit.

24 THE COURT: Number two, agency; is there any
25 objection to that one?

1 MR. WHITAKER: No, ma'am.

2 THE COURT: All right. Okay. I tell you what,
3 why don't we just go through them and you tell me which
4 ones you do have an objection to.

5 MR. WHITAKER: I'll be glad to do that. Number
6 five, about master servant liability, I guess that goes
7 to negligent misrepresentation, and I can see that. I
8 just want to be sure that's where that is going. I
9 think it is. There's no other negligence claim that
10 I'm aware of.

11 THE COURT: No. I asked about that yesterday, it
12 could only be the negligent misrepresentation claim as
13 far as negligence. Counsel?

14 MR. LUCEY: Yes, ma'am. Well, actually master
15 servant, we respectfully would apply to a number causes
16 of action, including the other torts, --

17 (Court reporter interruption.)

18 THE COURT: You can't hear -- oh, sorry.

19 MR. LUCEY: And, in fact, any course of conduct.
20 In this case, we have a lot of the defendant entities'
21 acts transpiring through their agents and employees,
22 both the Chads and the Joe Barnes, and the Civitas, now
23 known as the I'On Group LLC, that's now the managing
24 agent of all these entities. So we believe that the
25 agency and the master servant are relevant numerous.

1 causes of action, Your Honor.

2 THE COURT: I am not going to break the charge out
3 with respect to the causes of action. It will come
4 right underneath probably the agency charges, because
5 it seems to fit well there. You're certainly welcome
6 to argue in closing however you like. Okay.

7 MR. WHITAKER: Okay. I understand. Number 6 on
8 amalgamation, I think we can agree that one is not
9 going to go to the jury. As far as, you are not going
10 to actually decide on the law of amalgamation, that's
11 for Your Honor. It's just that -- that's not an issue
12 for them to determine. They can decide which
13 defendants they -- they are going to issue a verdict
14 against, but whether they are amalgamated is an issue
15 for the court.

16 THE COURT: Well, that's what I'm just asking
17 y'all about. Okay.

18 MR. LUCEY: Yes, Your Honor. They -- the -- they
19 don't hear the word "amalgamation" in this charge, they
20 are just told that they are entitled to treat several
21 corporations as one if they act that way, if they
22 demonstrate certain characteristics. It's simply
23 giving them an opportunity -- it's not telling them
24 what they have to do, it's instructing them as to the
25 law that guides them, and it's still up to them to make

1 that decision.

2 That allows them to make the decision when they
3 check on a cause of action as to which parties is
4 liable. For instance, on breach of contract, is it
5 just the party who is on the contract, or is the other
6 three parties that are amalgamated with the contracting
7 party. And they're going to argue in closing that
8 breach of contract can only be against the contracting
9 party, so this is very relevant.

10 MR. WHITAKER: Well, your Honor, my understanding
11 is that these issues are all equitable, as far as
12 whether it's, you know, veil piercing, alter ego,
13 amalgamation --

14 THE COURT: Here's the thing. They get some
15 instruction on how to treat these four different
16 entities that are going to be on the verdict form.

17 MR. WHITAKER: I understand.

18 THE COURT: I don't have to use the word
19 "amalgamation". Quite frankly, I could cut some of
20 this down. But if you want the four entities left on
21 the verdict form, they need some explanation about how
22 they're supposed to consider it.

23 MR. WHITAKER: And we have a charge on that, Your
24 Honor.

25 THE COURT: All right. Did you submit it last

1 night?

2 MR. WHITAKER: It is one of new ones, I believe
3 it's 28.

4 THE COURT: All right. Let me just pull it up.
5 Actually, that was one of the ones you sent earlier. I
6 got it. "There are four separate and distinct
7 corporate entities that have been named as defendants
8 in this action. A corporation is an entity that is" --
9 that doesn't discuss it. That doesn't have anything to
10 do with amalgamation. That's called distinct corporate
11 entities. Did you submit something related to
12 considering corporations that get confused amongst each
13 other?

14 MR. WHITAKER: Well, Your Honor, it was my
15 understanding that's an issue for the court, it's not
16 for the jury. And if you're saying it's for the jury
17 --

18 THE COURT: No, I said it was for the Court.
19 Y'all said, let's submit this verdict form this way.
20 I'm ready to rule on it if y'all will let me.

21 MR. WHITAKER: Oh, I'm sorry, Your Honor. I
22 thought what I said earlier was that we didn't think it
23 was for the jury, and that we didn't want the
24 amalgamation issue, but they have a separate section on
25 that verdict form for amalgamation. And we say we

1 don't want that on there.

2 What we are fine with and what makes sense, is
3 for there to be under each cause of action, each entity
4 is listed separately, and they can check. We think
5 that the I'On Company or I'On Club, but not the Realty,
6 or whichever else, is liable for that. And that's what
7 the plaintiffs propose and we're fine with that.

8 But what I'm saying is, the jury doesn't rule on
9 or decide whether a company and a club are amalgamated
10 for these purposes. Your Honor does that in
11 considering the equitable issues after their verdict
12 comes back, is my understanding. And that's what I
13 meant to argue earlier, if that's not how it came out,
14 I apologize.

15 THE COURT: Okay. No problem. No, I agree. It's
16 an issue for the court. The question that I've got if
17 I rule is -- if I find them amalgamated, do we send the
18 verdict form with the four of them on there, or do we
19 do it like Cliff Newman did on it, and send one entity
20 that's been amalgamated, or call defendants, the
21 defendants. And they either need an instruction not
22 just that the corporate entities are distinct, or we
23 need to rule on it before we get to the verdict form.
24 I mean, I can rule on it after. I mean, that's fine,
25 too. But I'm trying to look at the charges in the

1 context of the verdict form that will be sent back. So
2 Mr. Lucey?

3 MR. LUCEY: The Plaintiffs consent to the court
4 ruling on it before the verdict form is submitted. We
5 think it would be too confusing to try to do that after
6 the verdict form.

7 THE COURT: Okay. I'm ready to rule on it if
8 y'all are ready.

9 MR. DUFFY: Your Honor, we would have it, as we
10 discussed before, which is it goes to the jury. And if
11 Your Honor has a different decision, then that's --

12 THE COURT: Okay. I respectfully -- and I will
13 tell y'all, that Pope is on -- cert has been granted.
14 It may not end up holding as it has, but I'm also
15 looking -- let me pull my other document up -- Kincaid
16 vs. Landing Development Corporation, which was one of
17 the earliest amalgamation cases we had from 1986.

18 And it said there, the trial court ruled based
19 on evidence in that case that there was an amalgamation
20 of corporate interests, entities and activities so as
21 to blur the legal distinction between the corporations
22 and their activities. And the court agreed there and
23 set forth the reasons why.

24 These company are amalgamated here. Sometimes
25 Mr. Vince Graham on the stand couldn't even remember

1 which entity an action had been taken on behalf of. In
2 one of the letters back, I think to Ms. Adkins, there
3 was an -- that the I'On Company, TIC, did not sell you
4 this land. However, when we pulled the deed itself, I
5 believe -- and correct me if I'm wrong -- it came from
6 the I'On Company.

7 The shareholders, the controlling interests, all
8 of those were mixed in with the four I'On defendants
9 that are here. And the folks at I'On Realty worked for
10 these developers and used the marketing materials and
11 instructions that these developers provided to them.

12 Office spaces were shared to a certain extent.
13 The original plan, I think, given in 1997, was
14 presented by an entity that wasn't even a created
15 entity -- I think just the Graham Company, but there
16 was such a mixing that it's been hard for the
17 defendants to even testify during the trial which
18 entity did what.

19 So I'm going to find that they were amalgamated.
20 Mr. Lucey, anything else you want to put on the record
21 with respect --

22 MR. LUCEY: We withdraw charge number six.

23 THE COURT: Withdraw charge number six. Okay.
24 Then we'll withdraw it.

25 MR. WHITAKER: And let me just say in response to

1 that, that we rely on the cases cited in our brief on
2 the amalgamation issue.

3 THE COURT: Sure. Of course you do and I
4 understand -- you have argued it well, and presented
5 the evidence the best you could as advocates as far as
6 the separate and distinct entities that you discuss in
7 your proposed charge number 28.

8 The problem is, the evidence shows something
9 different. A higher court may disagree with me, but
10 this is now the second time I've sat through this. And
11 I've looked at everything and the entities here are
12 more entwined that those that I've even seen in -- for
13 example, just looking at Pope and Magnolia and Kincaid
14 Development, here, when the testifying defendants
15 themselves can't remember which company did which,
16 that's pretty telling to the Court. But that's not my
17 only reason. Okay.

18 MR. LUCEY: And defendant's 28 should be stricken
19 because it's no longer an issue in the case.

20 THE COURT: Right. And I will note your objection
21 for the record on that. So 28 will not go -- six will
22 not go. Let me get back to my other document. I
23 apologize, y'all. I'm without a law clerk today.

24 And please submit any charges that I don't
25 charge as court's exhibits. And then when we finish

1 with the whole charge, we'll make it a court's exhibit
2 as well.

3 Okay. So number seven, definition -- well, I'll
4 tell you what, let's go back to Mr. Whitaker, and we'll
5 go to the next one you have got an objection to.

6 MR. WHITAKER: Your Honor, number seven is -- kind
7 of ties in with number 12, it's on implied contract.
8 There's -- and not the whole number 12, but the part
9 that about implied contract, which is kind of in the
10 middle of the first paragraph, there is a sentence
11 about it, the second paragraph.

12 I just think they are trying to argue that
13 implied in the original Walbeck purchase contract, is
14 that there is a necessary term that CV-5 and 275 also
15 go with that. And I just think that seems really far
16 fetched --

17 MR. LUCEY: We'll withdraw the middle paragraph.

18 THE COURT: I'm sorry. Which one?

19 MR. LUCEY: We'll withdraw the middle paragraph of
20 number 7, that references implied contract.

21 THE COURT: Okay. Look at it now that we pulled
22 that out, Mr. Whitaker, if you would.

23 MR. WHITAKER: And then there is also, I guess the
24 third sentence of the first paragraph, says "if
25 manifested by conduct said to be implied".

1 MR. LUCEY: We'll withdraw that sentence, Your
2 Honor.

3 THE COURT: Okay.

4 MR. WHITAKER: And if I'm missing another implied
5 reference -- I don't see one, looking at it right now,
6 but those are the ones I'm aware of.

7 THE COURT: All right. In the other charge, you
8 reference number 11?

9 MR. WHITAKER: Twelve. And it's a whole charge on
10 implied contract, I believe.

11 THE COURT: All right, Mr. Lucey?

12 MR. LUCEY: Your Honor --

13 THE COURT: Tell me about that one.

14 MR. LUCEY: Your Honor, we believe this is -- it
15 says "good South Carolina law within a contract, there
16 is an implied term to do what is necessary to complete
17 the purpose and the ends of the contract", and we would
18 ask that it be charged.

19 THE COURT: Okay.

20 MR. WHITAKER: Your Honor, there -- for this
21 charge, they are citing the McCarro vs. Andreig case --
22 I've only got one copy, I apologize. Right before the
23 portion they're citing, the case talks about how in the
24 absence of an express agreement, there's a burden to
25 show an implied agreement; that implied terms are not

1 favored in the law. If it's going to be charged, we'd
2 at least like the implied terms not being favored in
3 the law to be added.

4 And I really think that there is an express
5 agreement, what needs to be implied to make it complete
6 within its four corners, I don't see anything. They
7 had argued that 275 and CV-5, you know --

8 THE COURT: I don't think it's just about --

9 MR. WHITAKER: -- but not on the contract.

10 THE COURT: I don't think it's just about CV-5.

11 MR. LUCEY: If the court is charging 15, the
12 covenant of good faith and fair dealing, I think that
13 we could decide that seven is superfluous, Your Honor.

14 THE COURT: All right. What about 12, though,
15 that's what we're on now. I am charging the covenant
16 of good faith and fair dealing.

17 MR. LUCEY: That's what I meant to reference.
18 Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. LUCEY: I think covenant of good faith would
21 cover it.

22 THE COURT: Okay. Well, I'll pull 12, but I'll
23 hear any objection you have as to covenant of good
24 faith and fair dealing as well.

25 MR. WHITAKER: Well, I got -- I can't deny that

1 it's an issue in the case, so...

2 THE COURT: I didn't think you could, but I just
3 wanted to make sure that I don't cause anybody not to
4 protect their record. What's next?

5 MR. WHITAKER: Your Honor, number 13, contract
6 modification, I'm not really aware of where there was,
7 you know, an attempt to modify the purchase contracts
8 of Walbeck and Adkins. They signed a contract. They
9 purchased a few months later. That was it.

10 THE COURT: Okay.

11 MR. LUCEY: Your Honor, the -- I believe we can
12 withdraw that one.

13 THE COURT: Okay. All right.

14 MR. WHITAKER: Your Honor, 17 and 18 are both
15 about bad faith. One -- 17 is from the restatement; 18
16 is from a South Carolina case. I think 18 is the one
17 that should be charged and not 17.

18 THE COURT: I -- when I was working on your
19 charges, I put in a different font the ones that I was
20 not comfortable with, and that I anticipated a problem
21 with; 17 is one of them. So I'm inclined to charge 18
22 and not 17. But take a look at it, Mr. Lucey, and let
23 me know.

24 MR. LUCEY: Your Honor, I think they will get to
25 the same point. We're fine with that.

1 THE COURT: All right.

2 MR. WHITAKER: Your Honor, number 22 is about
3 uncertain or contingent damages, and I don't think it's
4 an accurate statement of law. I'm sorry. I need to
5 wait for you to get there.

6 THE COURT: You know, I'm moving -- I'm going as
7 fast as I can.

8 MR. WHITAKER: I'm sorry.

9 THE COURT: That's okay. Twenty-two.

10 MR. WHITAKER: Yeah, I mean, it says that -- the
11 rule of damages, which are uncertain, can't be
12 recovered does not apply to the uncertainty of the --
13 the uncertainty of the amount. It's like a bit of a
14 stretch to me. And even the cases that are cited
15 below, the parentheticals go on to say -- the second
16 one, South Carolina Federal Savings Bank says "When
17 plaintiff seeks special damages, he or she must prove
18 both the fact of damage and amount with a reasonable
19 degree of certainty", that's not what the charge says.

20 THE COURT: Well, special damages aren't an issue
21 anymore because civil conspiracy is out. But I had --
22 my standard charge talks about the fact that damages
23 cannot be left to speculation or guess work. However,
24 mathematical precision is not required. What uncertain
25 or contingent damages are we talking about here? Why

1 do we even need charge 22?

2 MR. LUCEY: Your Honor, I think your standard
3 charge sounds like it covers it.

4 THE COURT: Okay. All right. Next.

5 MR. WHITAKER: Moving ahead to number 35, which is
6 about unfair trade practices and capacity, since
7 there's no claim by the HOA under unfair trade
8 practices, they've conceded. I don't really think we
9 need this charge.

10 MR. LUCEY: I agree, Your Honor.

11 THE COURT: Okay. And that's charge 35?

12 MR. WHITAKER: Yes, ma'am.

13 THE COURT: Okay. Thank you. Okay.

14 MR. WHITAKER: Number 40, we contend there's no
15 fiduciary duty, at least not to the individuals -- I
16 mean, we talked about duty to the HOA, so there can't
17 be constructive fraud, because there's no fiduciary
18 duty to the individuals. And that -- constructive
19 fraud only lies in a fiduciary situation.

20 MR. LUCEY: Your Honor, I'm unaware of any
21 limitation, constructive fraud only applies to a
22 fiduciary duty. There has been constructive fraud and
23 actual fraud, and -- and that's the difference. I
24 don't believe that's applicable -- the argument is
25 applicable.

1 THE COURT: Isn't that the same distinction
2 between fraud and negligent misrepresentation, and --
3 and the intent to deceive? Why do we need fraud,
4 constructive fraud and negligent misrepresentation?

5 MR. LUCEY: Your Honor, negligent
6 misrepresentation by itself, without the gross
7 negligence, wouldn't give rise to punitive damages. My
8 understanding of constructive fraud and fraud would
9 give rise to punitive damages, and that's why we
10 maintained all three. Strictly speaking, the -- fraud
11 has nine elements; constructive fraud has eight; and
12 negligent misrepresentation, depending on the context,
13 has three or four.

14 THE COURT: All right. Mr. Whitaker.

15 MR. WHITAKER: Well, Your Honor, I agree that
16 negligent misrepresentation is different in more than
17 just one element from fraud. I'm fine with that. But
18 constructive fraud does require there to be a fiduciary
19 duty and that's -- the case we have cited in our DV
20 brief, at page 27, is Artis vs. Cox. There are other
21 cases as well. But it just says constructive fraud
22 differs -- I'm going -- the second sentence of that
23 last paragraph --

24 THE COURT: Slow down for me.

25 MR. WHITAKER: I'm so sorry. I'm so sorry.

1 "Constructive fraud only lies where the defendant has a
2 confidential fiduciary relationship to the Plaintiffs."
3 I'm sorry. I'm trying. So there are other cases in
4 South Carolina on that as well. You can't have
5 constructive fraud without having a fiduciary
6 relationship.

7 THE COURT: I'm just trying to consider
8 constructive fraud in the developer context and I'm
9 having a little bit of trouble getting there.

10 MR. LUCEY: The biggest place would be, Your
11 Honor, when the -- when the person has a duty to speak;
12 when they have information, that they have a duty to
13 disclose, and they don't disclose. They don't speak.
14 The silence itself will be constructive fraud.

15 THE COURT: Okay. Such as I'm working with Bruce
16 Kinney, but I've got this other deal going on at the
17 same time with Mike Russo?

18 MR. LUCEY: Correct. Or, for instance, telling
19 them on March 25th we're deeding it to you, we're
20 transferring a parcel of land. And then the night of
21 March 25th, continuing negotiations without disclosing
22 to the Assembly that the representation made over that
23 day was no longer accurate.

24 THE COURT: Okay. Since the fiduciary duty issue
25 is still before the jury, I'm going to allow the charge

1 on constructive fraud, but I note your objection for
2 the record. Okay.

3 MR. WHITAKER: Number 43, you know, is a statement
4 of fiduciary duty as they see it. As you know, we --
5 we believe the duty is far more limited and it -- I
6 think even if you're right, and this charge goes to the
7 jury, I know that's what you have ruled, I think this
8 goes too far, as far as guessing what the duty is, and
9 it's going to need to be scaled down some. I don't
10 have an alternative version. I apologize. I mean, I
11 can work on one.

12 THE COURT: I can work with that. Mr. Lucey.

13 MR. LUCEY: Yes, Your Honor. Each -- each
14 paragraph sets forth an accurate description of the
15 fiduciary duty. And I'd be happy to defend any of that
16 paragraph that the defendant challenges. This is an
17 accurate statement of the law.

18 THE COURT: I'm uncomfortable, I think, with the
19 rebuttable presumption language. I'm just going to
20 need to look at the case law on that, I think.

21 MR. WHITAKER: Your Honor, one other thing I would
22 add, is in paragraph one where they split what was -- I
23 think two elements into three, there was an A, a B, and
24 C, it's Concerned Dunes West actually reads A and B are
25 one element. In other words, they tried to make -- and

1 this is a key point -- they tried to make the duty to
2 hand it over, and the duty to hand it over in good
3 condition, are two different things. What Dunes West
4 actually says is that's one duty if you hand it over --

5 THE COURT: I'm not going to read A, B, C.

6 MR. LUCEY: We're fine with making it one, and
7 we're fine with the court simply striking the rebuttal
8 language to save the court time. And I believe the
9 court was referencing the last sentence of the third
10 paragraph.

11 THE COURT: Yes.

12 MR. LUCEY: Plaintiff --

13 THE COURT: Well, that paragraph actually, that
14 whole paragraph.

15 MR. LUCEY: Yes, Your Honor. That's fine with the
16 plaintiff.

17 THE COURT: Mr. Whitaker, look at it again. I
18 still note your objection to the prior language.

19 MR. WHITAKER: You need me to go on to the next
20 one?

21 THE COURT: No. I've looked at it. Tell me -- if
22 you need a minute, that's fine.

23 MR. WHITAKER: I agree that, you know, I'm also
24 concerned about paragraph three certainly.

25 THE COURT: It's out.

1 MR. WHITAKER: Yeah, okay.

2 THE COURT: That paragraph, but the rest of it I
3 will charge.

4 MR. WHITAKER: Nothing else about the language,
5 Your Honor, it's just the principle judiciary duty.

6 THE COURT: All right.

7 MR. LUCEY: Okay, 45, 46, 47, 48, plaintiff
8 withdraws because that cause of action is out.

9 THE COURT: 45 through 48. Okay.

10 MR. WHITAKER: Your Honor, number 50 is on -- on
11 doctrine and limitations. My concern there is the last
12 paragraph, which talks about that -- although there may
13 be evidence to support an injured parties' filing a
14 claim at an earlier date, the period does not begin to
15 run until the injury rises to a level substantial
16 enough to put the injured party on notice that they are
17 being wronged. I don't think that's an accurate
18 statement of the law --

19 THE COURT: I don't either --

20 MR. WHITAKER: -- of subjective standard. And the
21 cases being cited -- I know these things are mistakes
22 and they happen, but the Martin case doesn't say that.

23 THE COURT: Right. I -- the -- I'm inclined to
24 delete that last paragraph. The law, as I understand
25 it, is -- the injury doesn't have to rise to a

1 substantial level before there can be a triggering of
2 the statute of limitations.

3 MR. LUCEY: Your Honor, I think the last paragraph
4 is adequately -- implicitly covered by the first
5 paragraph and plaintiff would withdraw it.

6 THE COURT: Okay. Great.

7 MR. WHITAKER: Your Honor, 51, as you said, the
8 seal cases are all over the map. The thing I think is
9 missing from this one primarily is an intent element,
10 which is in the cases. There's got to be an intent to
11 be sealed.

12 THE COURT: Right.

13 MR. WHITAKER: And, you know, beyond that, I could
14 take a crack at what it should say but.

15 THE COURT: Did y'all submit one?

16 MR. WHITAKER: We did not, because we don't think
17 that -- we don't think any contract was sealed. We
18 don't think that's an issue.

19 THE COURT: I will look at -- when I let y'all go
20 for lunch -- at the two cases that seem to be mirroring
21 images one of another, and find the intent language.
22 Because I think that's the key issue here, and the jury
23 is going to have to figure that out. So I'll get some
24 language for that and share it with y'all before we
25 charge.

1 MR. LUCEY: Yes, Your Honor. And I think my
2 office attempted to do that with the "should be"
3 language, and we totally consent to changing --

4 THE COURT: Okay.

5 MR. LUCEY: -- to read the intent of the parties
6 --

7 THE COURT: I'll pull some language right out of
8 the case and use that. Okay.

9 MR. WHITAKER: Your Honor, 52 equitable estoppel
10 is for the court.

11 THE COURT: Yeah, gone.

12 MR. WHITAKER: As I believe is -- and this is
13 honestly my ignorance in not knowing prejudgment
14 interest, if they're supposed to decide that, fine; but
15 58 is in there. I think --

16 THE COURT: I took that out. I took out
17 prejudgment interest.

18 MR. LUCEY: Your Honor, if I may on the equitable
19 estoppel, while most equitable issues are for the
20 court, because this is a defense to a cause at law, a
21 legal claim, we do believe that in fairness, it needs
22 to be submitted to the jury with the legal claims.

23 MR. WHITAKER: Your Honor, as I read the cases,
24 there was some confusion about this issue, that the
25 Supreme Court straightened out maybe ten years ago. It

1 is cited in our DV brief, but now --

2 THE COURT: Can you tell it to me now?

3 MR. WHITAKER: Yeah, let me find it real quick.

4 THE COURT: Well, actually I've got the brief.

5 MR. WHITAKER: It's somewhere in the first third
6 or so -- it's page seven and eight. The case we've
7 cited on page eight is Black vs. Lexington School
8 District Number Two. I think it cites to another case
9 that may be the first one that laid that rule down.
10 But the point is that line of cases shows that it's
11 definitely -- it's an issue of fact, but it's for the
12 court, not the jury. And those cases make that clear.

13 THE COURT: Do y'all not not want equitable
14 estoppel charged at all to the jury?

15 MR. WHITAKER: No, ma'am.

16 THE COURT: Why do you --

17 MR. LUCEY: Well, we're fine with that. If the
18 court is going to decide it after the verdict,
19 that's -- that's perfectly fine.

20 THE COURT: All right. I have a standard
21 credibility charge that I'll give. I also have the
22 expert charge about experts are allowed to give
23 opinions. I think the valuation testimony of lay
24 witnesses is proper. What else?

25 MR. WHITAKER: Yeah. One other thing that's

1 really in our charge is that neither side initially --
2 and I realized this last night -- had anything in their
3 fraud charge about clear and convincing evidence, which
4 clearly should be there, so that ought to be added.
5 But that's the only other thing I'm aware of with the
6 ones they propose.

7 THE COURT: All right. So no further objections
8 to the ones that the plaintiffs have proposed?

9 MR. WHITAKER: No, ma'am.

10 THE COURT: Okay.

11 MR. WHITAKER: Well, let me -- let me say one
12 thing about, if we proposed an alternate version, I
13 haven't -- I have not gone through all those, and I
14 apologize, and I'm going to go back and do that. I
15 didn't do that and I should have. I'm sorry. I'm
16 sorry.

17 THE COURT: No, no, I'm just -- let me get Mr.
18 Lucey's objection to the defendant's proposed charges,
19 then we'll go from there.

20 MR. LUCEY: Yes, Your Honor. Actually at this
21 point, based on the court's ruling, the majority of
22 them would be duplicative to -- if -- we believe that
23 charge number one is a charge on facts. They've either
24 established those facts of evidence or not, and we
25 object to it on that basis.

1 THE COURT: All right. I'm not going to charge on
2 the facts regarding -- when the things commenced, I
3 believe that's something the jury needs to figure out.
4 Okay.

5 MR. LUCEY: Number two, statute of limitations,
6 they're charging a three year statute, when a 20 year
7 statute might be available. And I believe we have
8 already covered it in ours anyway.

9 THE COURT: Mr. Whitaker?

10 MR. WHITAKER: Well, the three year statute does
11 apply to all but one claim. We think it's appropriate
12 to charge on that, and to make it clear that there may
13 be an issue with the contract claim.

14 THE COURT: Isn't the verdict form -- doesn't the
15 verdict form ask the jury to say which date something
16 occurred or accrued?

17 MR. WHITAKER: It does. And if it does, I guess
18 we don't have to reach that issue with the jury.
19 Because Your Honor -- and then we ask them about the
20 factual issues with the seal.

21 THE COURT: We are going to need to figure that
22 out. It's going to be depend on how the verdict form
23 goes back, whether that's charged or given to them to
24 just answer. So let's come back to that. All right.
25 Constructive notice, number three?

1 MR. LUCEY: Your Honor, I believe ours has been
2 accepted. I'm not sure, but I think so. We believe
3 ours is a more accurate statement of law.

4 THE COURT: Okay. Here's -- this is not the way
5 we're going to do this. Just because I -- they didn't
6 object to yours, or yours has been accepted, that
7 doesn't mean that -- just because they went first --
8 okay. You need to tell me the ones you object to as a
9 statement of the law.

10 MR. WHITAKER: And, Your Honor, I made another
11 mistake, the new charges that we just got this morning,
12 I didn't address, and I need to.

13 THE COURT: We'll do that -- let's do at the end,
14 because I have those in a different document.

15 MR. WHITAKER: Okay.

16 THE COURT: Okay.

17 MR. LUCEY: Your Honor, plaintiffs believe that
18 this is an inaccurate statement of the law, it is
19 incomplete. And we believe the plaintiff's
20 constructive notice charge is complete. There's not an
21 absolute constructive notice of all filed documents.
22 So our situation is where there was not constructive
23 notice of a filed document. And, therefore, we believe
24 the plaintiffs charge is more an accurate statement of
25 the law.

1 THE COURT: Okay. I'm inclined to agree with
2 that.

3 MR. WHITAKER: Yeah, you know, we are fine with --
4 which number is your constructive charge, Justin?

5 MR. LUCEY: I believe it's unnumbered.

6 MR. WHITAKER: One of the new ones.

7 THE COURT: Okay.

8 MR. WHITAKER: And I do have some objections to
9 that charge.

10 THE COURT: All right. Let me pull it up.

11 MR. WHITAKER: I have the second one of --

12 THE COURT: I'm looking at it. All right. I'm
13 not comfortable with this charge either. Do you want
14 to tell me what your objections are?

15 MR. WHITAKER: In particular, the -- it seems to
16 be saying that the -- especially the second paragraph,
17 has a right to sue regardless of whether they looked at
18 public records, that's -- that's a pretty strong
19 statement. It's more than it's a jury issue, whether
20 they were on notice or not for them to determine. And
21 to specifically state that, points it -- tilts it
22 pretty heavily in their favor -- whether reliance is
23 reasonable is for them -- I'm sure that will be in
24 whatever charge we end up having on reliance.

25 And the last paragraph as well, talking about